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ABSTRACT

A constitutional analysis is presented of the Establishment Clause of the First Amendment of Senate Bill 550, the Packwood-Moynihan proposal for federal tuition tax credits for parents who pay tuition in order to send their children to a nonpublic school. The Supreme Court has developed a three-part standard under the Establishment Clause: the legislation must have a secular purpose and a secular effect and it must not create excessive entanglements between government and religion. With respect to the secular purpose requirement, the articulated purpose of the Packwood-Moynihan proposal is to promote educational (not religious) pluralism and to enhance educational opportunity for all Americans at their chosen schools. The entanglements test has two concerns: whether legislation creates undue administrative involvements between church and state; and whether it fosters serious political divisiveness or fragmentation along religious lines. It is suggested that whereas the secular purpose and entanglements tests should not threaten the validity of federal tuition tax credits, the secular effect requirement presents a more difficult question. Attention is directed to the Committee for Public Education v. Nyquist decision, which invalidated New York's tuition tax benefit program. Among the arguments favoring the bill are the following: the proposal would grant assistance to individuals, not institutions; it proposed national tax legislation in line with the power of Congress to tax and spend; aid can be viewed as going to nonideological secular functions of church-related schools; and the legislation might help reserve freedom of educational choice which the Supreme Court has held is constitutionally protected. The text of the bill is appended. (SW)

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FEDERAL TUITION TAX CREDITS AND THE ESTABLISHMENT CLAUSE: A CONSTITUTIONAL ANALYSIS OF THE PACKWOOD-MOYNIHAN PROPOSAL

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FEDERAL TUITION TAX CREDITS AND THE ESTABLISHMENT CLAUSE: A CONSTITUTIONAL ANALYSIS OF THE PACKWOOD-MOYNIHAN PROPOSAL

SUMMARY

This memorandum addresses the constitutionality under the Establishment Clause of the First Amendment of Senate Bill 550, the Packwood-Moynihan proposal for federal tuition tax credits for parents who pay tuition in order to send their children to a nonpublic school.

Tuition tax benefit programs such as the Packwood-Moynihan proposal are one of the many current legislative attempts to ease a growing crisis in American education, and to protect parents' constitutionally protected choice to direct the education of their children by enrolling them in a nonpublic school. Because many (if not most) nonpublic schools in this country are church-affiliated, however, tuition tax benefit legislation invariably raises questions concerning the validity of such programs under the constitutional command that government "shall make no law respecting an establishment of religion."

Perhaps no issue in constitutional law is more difficult to resolve than the question whether and when the national legislature can offer assistance to nonpublic education. The Supreme Court itself has admitted that many of its decisions in this area contain no logical or principled rationale. Indeed, the courts which have confronted (state) tuition tax benefit legislation have predictably displayed the uncertainty which characterizes the issue: five courts have found such legislation to be unconstitutional, whereas two others have perceived no constitutional deficiencies.

Certain general concepts are settled, however. It is clear that whether federal tuition tax credit legislation would comport with the constitutional proscription of government "aid" to religion must be resolved in light of the three-part standard which the Supreme Court has developed under the Establishment Clause: the legislation must have a "secular purpose"; it must also have a "secular effect"; and finally, it must not create "excessive entanglements" between government and religion.

Neither the first nor the last of these tests should pose any threat to the constitutionality of Senate Bill 550.

With respect to the "secular purpose" requirement, the articulated purpose of the Packwood-Moynihan proposal is to promote educational (not religious) pluralism and "to enhance the quality of educational opportunity for all Americans at the schools . . . of their choice." Aside from being obviously secular, this stated purpose is virtually identical to what already has been accepted by the Supreme Court as constitutionally permissible.

The "entanglements" test has two concerns: whether legislation creates undue administrative involvements between church and state; and whether it fosters serious political divisiveness or fragmentation along religious lines.

The "administrative entanglements" prong of the test is totally inapplicable to federal tuition tax credit legislation. Put simply, legislation such as Senate Bill 550 contains none of the ingredients which traditionally have triggered the administrative entanglements concern.

The Packwood-Moynihan proposal also appears to be relatively devoid of political entanglements problems. It admittedly does not involve the serious type of political-religious confrontation to which the political entanglements idea is directed. Moreover, Senate Bill 550 is national legislation which by its very nature does not create the special benefits or religious preferences which can lead to political-religious dispute. And finally, the Bill proposes a tax measure which, unlike legislative grant programs requiring annual appropriation and funding debates, does not necessitate ongoing legislative oversight capable of leading to future religious lobbying.

Whereas the secular purpose and entanglements tests should not threaten the validity of federal tuition tax credits, the "secular effect" requirement presents a more difficult question. The courts which have invalidated tuition tax benefit programs have done so on the basis of the Supreme Court's inability in *Committee for Public Education v. Nyquist* to discern a secular effect in such legislation. The crucial issue for Senate Bill 550 is, therefore, whether it would have a permissible "secular effect."

The secular effect test traditionally was a relatively lenient one, requiring only that legislation not *primarily* aid religious interests. Collateral assistance to religious institutions, no matter how obvious, was wholly acceptable. Senate Bill 550 would undoubtedly be upheld under the traditional formulation of secular effect.

The *Nyquist* decision, however, dramatically rewrote the law of secular effect, transforming the test into a total prohibition of any aid of "substance." One noted commentator has described *Nyquist* as embodying a *"no aid"* standard.

Nyquist is particularly important to Senate Bill 550 because in that case the Court invalidated New York's tuition tax benefit program. Although the legislation confronted in *Nyquist* is easily distinguishable from the Packwood-Moynihan proposal, *Nyquist's* broad transformation of the meaning of secular effect has direct implications for all legislation assisting parents of nonpublic school students, including tuition tax benefits. Indeed, one post-*Nyquist* court noted that the tuition tax benefit program before it would have been upheld *but for* the changes in the secular effect test accomplished by *Nyquist*.

Careful reading of the decisions since *Nyquist*, however, leads to only one conclusion: the Supreme Court has backed away from the *Nyquist* "no aid" formula of secular effect and now is applying a "more flexible concept" resembling that which was found in the pre-*Nyquist* cases. Particularly instructive in this regard are the 1977 decision in *Wolman v. Walter* and the 1980 decision in *Committee for Public Education v. Regan*.

The result reached in *Nyquist*—invalidation of New York's tuition tax benefit plan—was a direct consequence of the "no aid" standard adopted in that case. Since that standard is no longer being followed, *Nyquist* must be considered as having reduced precedential value for future tuition tax benefit legislation, and particularly for the Packwood-Moynihan proposal. Whether Senate Bill 550 would have a permissible "secular effect" cannot be resolved merely by citation to *Nyquist*. Instead, that question must be answered in light of the factors which traditionally have been determinative of secular effect.

First, the Bill proposes *national tax legislation* pursuant to the constitutionally enumerated power of Congress to tax and spend. The tax credits contemplated by the Bill would accrue to the benefit of a broad class of persons nationwide. National legislation having such origins and effects is remarkably different from comparable state legislation. It contains an inherent assurance that impermissible considerations and effects are not present. There is abundant legislative precedent, both in the Internal Revenue Code and elsewhere, supporting federal tuition tax credits.

Second, the Packwood-Moynihan proposal would grant assistance to *individuals*, not to the institutions (religious or otherwise) which those individuals may happen to attend. Cases such as *Board of Education v. Allen* and *Everson v. Board of Education* support the proposition that such disbursement of aid to individuals rather than institutions is constitutionally permissible.

Third, even if Senate Bill 550 is considered to provide aid to church-related schools, such aid can be seen as going merely to the separable and nonideological secular functions of those schools. In the *Regan* case and in *Tilton v. Richardson* and *Hunt v. McNair*, the Supreme Court held that such nonideological assistance does not contravene the secular effect test.

Fourth, a tax credit does not involve affirmative governmental assistance but

is more in the nature of exemptive action. In *Walz v. Tax Commission* the Court was adamant that there is "no genuine nexus between tax exemption and establishment of religion."

Fifth, there can be little doubt that Senate Bill 550 comports with the "original understanding" of the First Amendment and the values constitutionalized by the Framers in that Amendment. Courts are bound to interpret and apply the values ratified by the people and hence embedded in the Constitution, not to fashion their own values into the cloth of constitutional law.

Finally, federal tuition tax credit legislation would be merely an attempt by Congress to preserve the freedom of educational choice which the Supreme Court has held is constitutionally protected. In this sense, Senate Bill 550 would have the effect of upholding constitutional rights rather than transgressing them.

Each of these factors taken individually favors the contention that the Packwood-Moynihan proposal would have a valid secular effect. When considered cumulatively, and in light of the suspect precedential value of *Nyquist*, they virtually demand that conclusion. And again, the secular effect issue is the critical one for tuition tax credits. The other elements of the three-part test should be easily satisfied.

In short, there are compelling arguments favoring the conclusion that federal tuition tax credit legislation such as Senate Bill 550 would pass constitutional scrutiny under the Establishment Clause.

FEDERAL TUITION TAX CREDITS AND THE ESTABLISHMENT CLAUSE: A CONSTITUTIONAL ANALYSIS OF THE PACKWOOD-MOYNIHAN PROPOSAL

DISCUSSION

I. INTRODUCTION

The right of parents to direct the education of their children is firmly established in American jurisprudence. *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 232 (1972). More than half a century ago, in the landmark case of *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), the Supreme Court announced that the Constitution itself protects parents' choice to have their children educated at a private school rather than a public institution.

The economic, social, and political changes which have occurred since *Pierce*, however, in many instances have rendered this constitutional protection effectively meaningless. On the one hand, parents who choose to have their children educated at a nonpublic school must bear the constantly escalating tuitions which those schools must charge to survive. On the other hand, these same parents must support public education through the tax assessments which are levied on all citizens. For many parents, this dual financial burden is too great to permit them to exercise their so-called constitutional right to send their children to a nonpublic school of their choice.

Legislatures at both the state and national levels have responded in a variety of ways to the need to preserve the viability of nonpublic education and to protect parents' freedom to make a meaningful choice concerning the education of their children. One such response has been tuition tax benefits for parents who send their children to nonpublic schools. Because a significant portion of the nonpublic schools throughout the country are church-affiliated, however, these tuition tax benefit programs invariably have generated questions concerning their validity under the constitutional proscription of government "aid" to religion.

This memorandum considers the constitutionality under the Establishment Clause of the First Amendment of one such tuition tax benefit program: Senate Bill 550, the Packwood-Moynihan "tuition tax credits" proposal.

II. AN OVERVIEW OF SENATE BILL 550

Federal income tax relief for educational expenses has been an ongoing subject of debate in Congress since the 1950s. Beginning in the mid-1960s and continuing on through the last decade, the focus of this debate shifted to tuition tax credits, as opposed to a tax deduction or some other form of benefit. *See American Enterprise Institute, Tuition Tax Credits and Alternatives* 7-11 (1978). The culmination of these efforts to date is the Packwood-Moynihan proposal.

Senate Bill 550 would permit a reduction in tax due by an amount equal to one-half of the educational expenses incurred for each child who is a full-time student at a qualifying educational institution, up to a maximum of $1000 per year.

The "educational expenses" for which a tax credit may be claimed under the Packwood-Moynihan proposal are limited to tuition and fees required for the enrollment or attendance of a student at a qualifying institution. Amounts expended for books, supplies, equipment for particular courses, meals, lodging, transportation, or other personal expenses cannot be taken into account in calculating the allowable credit. Similarly, the cost of education below the first-grade level or for post-baccalaureate graduate school is not within the definition of "educational expenses."

Whether tuition paid to an educational institution qualifies for a tax credit under the proposed legislation depends in part on the educational level involved. With respect to colleges and universities, any school within the meaning of an "institution of higher education" as defined by sections 481(a) or 1201(a) of the

Higher Education Act of 1965 is eligible. With respect to elementary and secondary schools, the school attended must be privately operated, not-for-profit, and exempt from taxation under section 501 of the Internal Revenue Code, and must not exclude students from admission on the basis of race, color, or national or ethnic origin.

Finally, Senate Bill 550 explicitly states that any tax relief forthcoming under its provisions is not to be construed as federal assistance to the institution attended by the student for whom credit is claimed. The proposal does not grant authority for a government examination of the books, accounts, or activities of any church-related school. These provisions are in accord with the policies underlying federal tuition tax credits: that tax credits constitute necessary federal aid to taxpayers, not to the institutions which those taxpayers or their dependents happen to attend. According to section 1 of the Packwood-Moynihan proposal: "The primary purpose of [the] . . . Act is to enhance the quality of educational opportunity for all Americans at the schools or colleges of their choice."

III. CONTEMPORARY STANDARDS OF ESTABLISHMENT CLAUSE ANALYSIS

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.
>
> [*U.S. Const.* Amend. I.]

The constitutional language is admittedly vague. As Chief Justice Burger noted in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), "candor compels acknowledgement . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."

Under the Establishment Clause this "vagueness" traditionally had translated into a two-part "purpose and effect" test. With its 1970 decision in *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970), the Court began to add a third element — that of "excessive entanglements." In *Lemon*, decided the following term, the Court engaged in a full articulation of the applicable standard:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster an excessive government entanglement with religion.
>
> [403 U.S. at 612-13 (citations omitted).]

Although the specific contours of these three elements (and particularly of the "effect" element) have undergone considerable change in the years since *Lemon*, this three-part standard has remained the basis for the Court's Establishment Clause analysis. Accordingly, for federal tuition tax credits to be valid, the resulting benefits must have both a secular purpose and a secular effect and must not create undue involvement between the federal government and religious elements.

IV. TUITION TAX BENEFIT LEGISLATION AND JUDICIAL ATTITUDES UNDER THE ESTABLISHMENT CLAUSE: THE NYQUIST DECISION

Tuition tax benefit legislation (at least at the state level) admittedly has not been greeted with open arms by the judiciary. To date, the constitutionality of tuition tax benefits has been confronted in seven cases. In five of those cases the legislation was found to be unconstitutional. *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Kosydar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio 1972), *aff'd mem sub nom. Grit v. Wolman*, 413 U.S. 901 (1973); *Rhode Island Fed-*

eration of Teachers v. Norberg, 630 F. 2d 855 (1st Cir. 1980); *Public Funds for Public Schools v. Byrne*, 590 F. 2d 514 (3d Cir. 1979); *Minnesota Civil Liberties Union v. Minnesota*, 224 N.W. 2d 344 (Minn. 1974). *But see Mueller v. Allen*, 514 F. Supp. 998 (D. Minn. 1981); *Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316 (D. Minn. 1978).

The leading case is the Supreme Court's decision in *Nyquist*. New York had enacted legislation providing that parents who have taxable income of less than $5000 per year could receive nonpublic school tuition reimbursement grants from the State of up to $100 per child (but not to exceed 50% of tuition actually paid). Parents who did not qualify for these reimbursement grants but whose adjusted gross income was less than $25,000 per year were eligible for a tuition tax "benefit" for each of their children who attended a nonpublic elementary or secondary school. Eligible parents were allowed to deduct a specified amount from their adjusted gross income for each such child. Unlike the tuition reimbursements, however, the amount of the tax benefit was not related to the amount expended on nonpublic school tuition.

The Court invalidated both programs as violative of the Establishment Clause, on the ground that neither could satisfy the "secular effect" element of the Court's three-part analysis. With respect to the tuition reimbursement program, the Court found that the statute's lack of specifically articulated secular restrictions caused the program to have the "inevitable effect" of subsidizing "the religious mission of sectarian schools." 413 U.S. at 789-90. The Court then condemned the tuition tax benefit program for essentially the same reasons. It asserted that for purposes of constitutional analysis there should be no significant distinction between receiving an actual cash payment for sending one's child to a nonpublic school and being permitted to lessen a tax burden otherwise owed for undertaking the same activity. 413 U.S. at 789-91.

Opponents of federal tuition tax credit legislation argue that *Nyquist* has already decided that such legislation would be unconstitutional. Such an argument ignores both compelling assertions to the contrary and the fact that this area of constitutional law is particularly unsettled. Professor Philip Kurland's remarks in his 1962 treatise on the subject remain accurate today:

> [With respect to] the continuing question whether the national government can contribute financially to parochial education, directly or indirectly . . . , anyone suggesting that the answer, as a matter of constitutional law, is clear one way or the other is either deluding or deluded.
>
> [*P. Kurland, Religion And The Law* 111 (1962).]

Nyquist was merely one chapter in a continuing constitutional saga. The *Nyquist* decision itself left open many of the questions that are raised by the Packwood-Moynihan proposal. Additionally, decisions of the Court since *Nyquist* indicate a shift in analytical emphasis, at the least, if not a fundamental restructuring of Establishment Clause doctrine. These latter decisions leave the continuing viability of *Nyquist* in question. The constitutionality of federal tuition tax credits cannot be resolved merely by citation to *Nyquist* or any other case. Resolution of the issue requires an independent and detailed examination of federal tuition tax credits in light of the entire body of Establishment Clause doctrine.

V. FEDERAL TUITION TAX CREDITS AND THE SECULAR PURPOSE ELEMENT

It appears extremely unlikely that the Packwood-Moynihan proposal would fail to pass constitutional scrutiny under the secular purpose prong of the Court's Establishment Clause construct. The requirement of a secular purpose does not mean that government must act to promote *purely* secular goals. In *Walz v. Tax Commission*, for example, Chief Justice Burger noted that "the legislative purpose . . . is neither the advancement nor the inhibition of religion; *it is neither sponsorship nor hostility*." 397 U.S. at 672. In this light, the secular purpose test is not so much a requirement that government have a secular purpose as it is that it *not* have a religious purpose.

The distinction is significant. A pure secular purpose requirement would mean that any legislative consideration of religious goals would be unlawful. Even a brief reading of the cases indicates otherwise. For example, even in the school prayer cases many of the Justices seemed to recognize a "non-religious" purpose. *E.g., Abington School District v. Schempp*, 374 U.S. 203, 212-14, 223, 225 (1963); *McGowan v. Maryland*, 336 U.S. 420, 445 (1961). Indeed, there are only two cases, *Epperson v. Arkansas*, 393 U.S. 97 (1968), and *Stone v. Graham*, 449 U.S. 39 (1980), in which the Court struck down legislation for lack of a secular purpose. And even in those cases there was disagreement among the Justices concerning whether a secular motive might be present.

Additionally, the Court's method of discerning whether a permissible secular purpose exists is not a searching one. The Court merely looks to what the government says its purpose is. In *Lemon*, for example, the Court stated:

> The statutes themselves clearly state that they are intended to enhance the quality of secular education in all schools. . . . *There is no reason to believe the legislature meant anything else.*
>
> [*Lemon v. Kurtzman*, 403 U.S. at 613 (emphasis added).]

The Packwood-Moynihan proposal certainly should survive this minimal scrutiny secular purpose standard. The recitation of legislative purpose appended to the proposal indicates that Senate Bill 550 is meant to promote *only* secular values. The Bill itself is a response to an ever-growing crisis in all American education. *See American Enterprise Institute, Tuition Tax Credits and Alternatives* 15-20 (1978). Its stated purpose is to promote educational (not religious) pluralism. Such a purpose is obviously secular. Indeed, not only is the articulated intent of Senate Bill 550 very similar to that found permissible in *Lemon* but also (and perhaps more importantly) it is nearly identical to the legislative purpose accepted in *Nyquist*:

> [W]e need touch only briefly on the requirement of a "secular legislative purpose." . . . [*W*]*e do not doubt—indeed, we fully recognize—the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might suffer in the event that a significant percentage of the children presently attending nonpublic schools should abandon those schools in favor of the public schools.*
>
> [*Committee for Public Education v. Nyquist*, 413 U.S. at 773 (emphasis added).]

Nyquist is explicit authority for the proposition that Senate Bill 550 has a permissible secular purpose. Consequently, the first step of the three-part Establishment Clause test should present no obstacle to the constitutional validity of federal tuition tax credit legislation.

VI. FEDERAL TUITION TAX CREDITS AND THE SECULAR EFFECT ELEMENT

A. The Shifting Meaning of Secular Effect And Continued Viability Of Nyquist

The late Justice Harlan once remarked that "it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application." *Walz v. Tax Commission*, 397 U.S. at 694 (Harlan, J., concurring). Justice Harlan's observation is perhaps most accurate with respect to the secular effect element of the Establishment Clause test. Over the past two decades this element has undergone numerous subtle yet highly significant transformations in meaning, with the rather unfortunate consequence that the exact contours of "secular effect" are difficult to perceive from one Supreme Court decision to the next.

Proper understanding of the secular effect test is crucial to any constitutional evaluation of federal tuition tax credit legislation. The result reached in *Nyquist*, for example, was the direct consequence of judicial inability to discern a secular effect in New York's tuition tax benefit program. Whether the *Nyquist* formulation of secular effect remains valid, however, is questionable.

1. The Traditional Meaning Of Secular Effect

The requirement of secular effect traditionally meant that legislation would be held constitutionally infirm on this ground only if its *primary* or *principal* effect was "to influence—either positively or negatively—the pursuit of a religious tradition or the expression of a religious belief." *L. Tribe, American Constitutional Law* 839 (1978) (hereinafter cited as *Tribe*). In its 1963 decision in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), for example, the Court cited to *Everson v. Board of Education*, 330 U.S. 1 (1947), and stated: "The test [is] . . . what are the purpose and the *primary effect* of the enactment? . . . [T]o withstand the strictures of the Establishment Clause there must be . . . a *primary effect* that neither advances nor inhibits religion." This standard was quoted with approval five years later in *Board of Education v. Allen*, 392 U.S. 236, 243 (1968), in which the Court upheld textbook loans to students attending nonpublic schools. The Court's discussion in *Allen* of why such a program did not have a "primary effect of advancing religion" is helpful in understanding what the Court meant (at least in *Allen*) by a "primary" effect:

> The test is not easy to apply, but the citation of *Everson* by the *Schempp* Court to support its general standard made clear how the *Schempp* rule would be applied to the facts of *Everson*. The statute upheld in *Everson* would be considered a law having "a . . . *primary effect that neither advances nor inhibits religion.*" We reach the same result with respect to the . . . law . . . [challenged here]. The law merely makes available to all children the benefits of a general program to lend books free of charge. . . . *Perhaps free books make it more likely that some children choose to attend a sectarian school, but that . . . does not alone demonstrate an unconstitutional degree of support for a religious institution.*
>
> [392 U.S. at 243-44 (emphasis added).]

The *Allen-Schempp-Everson* formulation of secular effect reached maturity in *Tilton v. Richardson*, 403 U.S. 672 (1971), in which the Court upheld construction grants provided to religious colleges under Title I of the Higher Education Facilities Act of 1963. In *Tilton* Chief Justice Burger stated: "The crucial question is not whether *some benefit* accrues to a religious institution as a consequence of the legislative program, but whether its *principal* or *primary* effect advances religion." 403 U.S. at 679. This clearly was not a "no aid" standard. Instead, under *Tilton* and

the earlier cases it seemed that legislation satisfied the Establishment Clause if its necessary effect was at least "arguably non-religious."

2. Secular Effect In Transition: The Nyquist "No-Aid" Standard

The fairly permissive *Tilton-Allen-Everson* secular effect standard did not remain the law. The first hints of a shift to a more searching test could be seen in the 1970 decision in *Walz*, and even more clearly in the following year's decision in *Lemon*. Neither *Walz nor Lemon* elaborated upon the secular effect element, however. Instead they only cast it into a state of confusion—a confusion which ultimately led to an open battle among the Justices in *Nyquist* as to the true meaning of the secular effect requirement.

As noted earlier, the majority in *Nyquist* invalidated New York's tuition reimbursement and tax benefit programs on the ground that they had the impermissible "effect" of providing "financial support for nonpublic, sectarian institutions." 413 U.S. at 783. The majority's textual reasoning in support of this conclusion was by no means persuasive. Justice Powell (the author of the majority opinion) admitted that the legislation in question had the effect of perpetuating "a pluralistic educational environment" and protecting "the fiscal integrity of overburdened public schools." 413 U.S. at 783. He admitted further that these effects were "secular" in nature. 413 U.S. at 783 & n.39. Despite the fact that these "effects" were very similar to (if not indistinguishable from) those found in *Allen* (for example) to be constitutionally valid, Justice Powell considered the New York legislation to lack a "primary secular effect."

Justice Powell's unique textual application of the secular effect test did not escape notice. In dissent, Justice White (joined by Chief Justice Burger and Justice Rehnquist) took the majority to task, arguing that they had ignored precedent:

> *[T]he test is one of "primary" effect, not any effect. The Court makes no attempt at that ultimate judgment necessarily entailed by the standard heretofore fashioned in our cases.*
>
> [413 U.S. at 822-23 (White, J., dissenting) (emphasis added).]

Justice Powell and the *Nyquist* majority retorted in a footnote, and in so doing they effectively admitted that they had rewritten the secular effect test. The Court stated in footnote 39:

> Appellees, focusing on the term "principal or primary effect" which this Court has utilized in expressing the second prong of the three-part test, . . . have argued that the Court must decide . . . whether the *"primary effect"* of New York's tuition grant program [and its tuition tax benefit program] is to subsidize religion or to promote . . . legitimate secular objectives. Mr. Justice White's dissenting opinion . . . similarly suggests that the Court today fails to make this "ultimate judgment." We do not think that such metaphysical judgments are either possible or necessary. *Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion.* . . . [I]nstead, approval [of laws in our prior cases] flowed from the finding . . . that they had *only a remote and incidental effect advantageous to religious institutions.*
>
> [413 U.S. at 783 n. 39 (emphasis added).]

The Court in *Nyquist* worked a dramatic transformation of the meaning of "secular effect." Instead of the "arguably non-religious" test of *Allen* and *Tilton*, *Nyquist* required that legislation have only a remote, indirect, and incidental

beneficial impact upon religious interests. Even if a statute has a "primary" secular effect according to footnote 39, it is invalid if it nevertheless also has a "direct and immediate effect" of aiding religion. Such a standard is onerous indeed. Professor Tribe has aptly summarized the impact of *Nyquist*:

> The constitutional requirement of "primary secular effect" has thus become a misnomer; while retaining the earlier label, the Court [in *Nyquist*] has transformed it into a *requirement that any non-secular effect be remote, indirect, and incidental.* This shift is significant, for the remote-indirect-and-incidental standard plainly compels a more searching inquiry, and comes closer to the *absolutist no-aid approach* to the establishment clause than the primary effect test did.
>
> [*Tribe, supra,* at 840.]

That *Nyquist* completely rewrote the law of secular effect was startling enough. The way in which the Court proceeded to interpret its newly adopted "no aid" "remote and incidental" standard was even more surprising. Given that the New York legislation had an apparently permissible "secular" effect according to earlier cases such as *Allen*, Justice Powell found it necessary, in order to strike down the legislation, to construe his "remote and incidental" concept in a manner totally new to Establishment Clause doctrine. He reasoned that regardless of whatever legitimate and permissible "primary" secular effects the legislation may have possessed, the *"great majority"* of the nonpublic schools toward which it was directed were church-affiliated. Accordingly, asserted Justice Powell, the "effect" of the legislation was "unmistakably to provide desired financial support for nonpublic, sectarian institutions." 413 U.S. at 783.

Justice Powell's "great majority" argument was not entirely foreign to Establishment Clause jurisprudence. Judicial scrutiny of the percentage of religious-affiliated persons or institutions within the class benefited by a facially neutral program had been employed in previous cases to determine whether such a program has a *permissible secular purpose.* But, as Chief Justice Burger pointed out in dissent, the "great majority" argument had never been used to discern whether legislation had a *permissible secular effect:*

> I fear that the Court has in reality followed the unsupportable approach of measuring the "effect" of the law by the percentage of the recipients who choose to use the money for religious, rather than secular, education.
>
> With all due respect, I submit that such a consideration is irrelevant to a constitutional determination of the "effect" of a statute. For purposes of constitutional adjudication of that issue, it should make no difference whether 5%, 20%, or 80% of the beneficiaries of an educational program of general application elect to utilize their benefits for religious purposes. The "primary effect" branch of our three-pronged test was never, at least to my understanding, intended to vary with the *number* of churches benefited by a statute under which state aid is distributed to private citizens.
>
> Such a consideration, it is true, might be relevant in ascertaining whether the *primary legislative purpose* was to advance the cause of religion. But the Court has . . . summarily dismissed the contention that . . . New York . . . had an improper purpose in enacting these laws. . . . [I]n light of this Court's recognition of these secular legislative purposes, I fail to see any acceptable resolution . . . except one favoring constitutionality.
>
> [413 U.S. at 804-05 (Burger, C.J., dissenting) (emphasis in original).]

Nyquist, in summary, adopted what amounts to a "no aid" approach. According to Justice Powell, if the class of beneficiaries of an educational aid program

can be characterized as "significantly religious," then the program's effect is not merely "remote and incidental." Hence, it must be found unconstitutional. Such a "no aid" test was absolutely necessary for the Court to strike down the New York statutes at issue in *Nyquist*. The majority itself recognized the apparent secular effects of New York's tuition reimbursement and tax benefit programs. As the dissent noted, under any other more lenient secular effect standard (and particularly under the secular effect standards of prior cases such as *Allen*, *Tilton*, and *Everson*), the legislation would have been upheld. The key to the result in *Nyquist*, therefore, is its adoption of the footnote 39 "no aid" "remote and incidental" secular effect approach.

3. Nyquist Applied: The Minnesota And Meek Decisions

It is debatable whether any meaningful program benefiting nonpublic education, regardless of how carefully tailored, could survive the *Nyquist* footnote 39 "no aid" standard. Indeed, in the first post-*Nyquist* decision to confront tuition tax benefit legislation, the court read *Nyquist* to be an absolute prohibition of any religious effect whatsoever, no matter how tangential such effect may be.

In *Minnesota Civil Liberties Union v. Minnesota*, 224 N.W.2d 344 (Minn. 1974), the Supreme Court of Minnesota was faced with a state statute that provided a tax credit for parents who paid tuition to send their children to a nonpublic elementary or secondary school. The trial court had found that the statute satisfied each prong of the three-part Establishment Clause test and hence was constitutional. The Minnesota Supreme Court reversed, however, on secular effect grounds. It first noted that "absent subsequent decisions of the [United States] Supreme Court, the trial court's finding that the legislation had a permissible secular effect was fully justified under the standards established . . . in *Tilton v. Richardson*." 224 N.W.2d at 349. According to the Minnesota court, however, the intervening decision in *Nyquist* "effectively changed the course of establishment questions." 224 N.W.2d at 350.

The Minnesota Supreme Court then referred to Justice White's dissenting statement in *Nyquist* that the secular effect "test is one of *primary* effect, not *any* effect," quoted in full Justice Powell's response in *Nyquist* footnote 39, and concluded:

> In applying the "primary effects test" we must be guided by the realization, as indicated above [referring to *Nyquist* footnote 39], that *this is no longer a primary effects test but an "any effects" test*. Under such a standard, the legislation in question cannot pass constitutional muster.
>
> [224 N.W.2d at 353 (emphasis added).]

The Minnesota Supreme Court's invalidation of the tuition tax benefit legislation before it was, according to the court, a direct consequence of *Nyquist* footnote 39 and its "no aid" (or "no effect") approach. Under the secular effect standard of earlier cases such as *Tilton* the Minnesota statute would have been upheld.

The apparent accuracy of the Minnesota Supreme Court's reading of *Nyquist* footnote 39 was confirmed by the United States Supreme Court's first significant post-*Nyquist* decision. In *Meek v. Pittenger*, 421 U.S. 349 (1975), the Court appeared to hold that the *Nyquist* formulation of secular effect was a virtual prohibition of all "aid" of any substance.

Meek presented a challenge to Pennsylvania statutes creating three assistance programs for nonpublic elementary and secondary education: (1) a textbook loan program virtually identical to that upheld in *Allen*; (2) a similar program providing for loans of instructional materials such as maps, charts, and audio-visual equipment; and (3) an auxiliary services program, by which remedial education,

guidance and counseling, and speech and hearing therapy services were furnished to nonpublic school children. Expressing unwillingness to overrule *Allen*, the Court upheld the textbook loan program. 421 U.S. at 359-62. The remaining programs did not fare as well. Both were struck down—auxiliary services because they created an impermissible "excessive entanglement between church and state," 421 U.S. at 367-72, and instructional materials because they had an impermissible "effect" of advancing religion. 421 U.S. at 362-66. In invalidating the latter the Court was clear that it was following the "remote and incidental" formula of *Nyquist* footnote 39. Justice Stewart (who authored the *Meek* majority opinion) first spoke of the necessity that any benefit to church-related schools be "indirect and incidental," citing to *Nyquist*. 421 U.S. at 364-65. He then announced, explicitly relying on *Nyquist* footnote 39, that any "*substantial aid*" to church-related schools violates the secular effect requirement, because such "substantial aid . . . inescapably results in the direct and substantial advancement of religious activity." 421 U.S. at 366.

In a separate opinion, Justice Brennan (joined by Justices Douglas and Marshall) was even more clear that the *Meek* Court was applying the "no aid" secular effect standard of *Nyquist* footnote 39. Justice Brennan even went so far as to quote the "indirect and remote" language of *Nyquist*. 421 U.S. at 373 & n.1.

The holding in *Meek* (and that in the Minnesota case), therefore, was a direct result of *Nyquist* footnote 39 and its "remote and incidental" formulation of the secular effect element.

4. Rejection Of The Nyquist-Meek "No Aid" Standard: The Wolman And Regan Decisions

The *Meek-Nyquist* footnote 39 standard appeared to spell doom for any meaningful assistance to nonpublic elementary and secondary education. Given that at least a significant portion of nonpublic schools are church-related, *Meek* and *Nyquist* effectively erected a virtually irrebuttable presumption that "aid" to nonpublic schools will have a constitutionally impermissible religious effect.

The *Meek-Nyquist* "no aid" standard has not remained the law, however. Since those decisions the Court has evinced a marked shift back to the more flexible measures of secular effect found in cases such as *Allen* and *Tilton*. The first hint of this retreat to a more favorable posture towards assistance to nonpublic education came in *Wolman v. Walter*, 433 U.S. 229 (1977).

In *Wolman* the Court upheld those portions of an Ohio statute authorizing expenditures of State funds for supplying nonpublic school students with textbooks, standardized testing and scoring services, speech and hearing diagnostic services, and special education therapeutic and remedial services. Although the Court relied upon *Meek* and *Nyquist* to invalidate those parts of the statute which provided nonpublic schools with instructional materials and field trip services, it was clear that the "no aid" standard of *Meek* and *Nyquist* was not being given full effect. Indeed, many of the programs upheld in *Wolman* were strikingly similar to those condemned in *Meek*.

Wolman unfortunately did not engage in any detailed elaboration of the analytical construct that was being applied. Justice Blackmun's opinion concentrated instead upon the specific provisions of the statute in question. It is interesting to note, however, that nowhere in his *Wolman* opinion did Justice Blackmun cite *Nyquist* footnote 39.

The implication of *Wolman*—that the Court had backed away from the "no aid" approach of *Meek* and *Nyquist*—was confirmed in *Committee for Public Education v. Regan*, 444 U.S. 646 (1980). *Regan* involved a challenge to a New York statute authorizing the use of State funds to reimburse nonpublic schools for the costs of performing various testing and reporting services required by State law. New York had enacted a similar law in 1970. The 1970 version, however, applied to

both State-prepared examinations and teacher-prepared tests. Finding that reimbursement for the latter posed the potential for State funding of examinations reflecting "religious instruction," the Court struck down the 1970 legislation in *Levitt v. Committee for Public Education (Levitt I)*, 414 U.S. 472 (1973).

Following *Levitt I*, the New York legislature returned to the drawing board and in 1974 enacted the statute that the Court eventually confronted in *Regan*. Although the 1974 version was limited to reimbursement of State-prepared examinations, and thus according to *Levitt I* should have been acceptable, it nevertheless was invalidated in *Levitt II* by the United States District Court for the Southern District of New York. *Committee for Public Education v. Levitt (Levitt II)*, 414 F. Supp. 1174 (S.D.N.Y. 1976). The district court relied extensively on the Supreme Court's intervening decision in *Meek* for the proposition that any "substantial aid" to nonpublic, predominantly church-affiliated schools was unconstitutional.

Levitt II was appealed directly to the Supreme Court, where (surprisingly, given the apparent clarity of the *Meek-Nyquist* "no aid" rule), it was vacated and remanded for reconsideration in light of the opinion in *Wolman*. *See Levitt v. Committee for Public Education (Levitt III)*, 433 U.S. 902 (1977) (vacating and remanding *Levitt II*).

On remand (in *Levitt IV*) the district court was faced with apparently irreconcilable Supreme Court precedent. On the one hand, *Meek* and *Nyquist* purported to forbid all "substantial aid" to nonpublic, predominantly church-affiliated schools. On the other hand, *Wolman* at least impliedly indicated that the *Meek-Nyquist* formulation of the secular effect test was no longer to be strictly followed. The district court first framed the "central issue" as whether the New York statute had the "primary effect" of advancing religion. *Committee for Public Education v. Levitt (Levitt IV)*, 461 F. Supp. 1123, 1127 (S.D.N.Y. 1978). Citing *Nyquist* footnote 39, the district court acknowledged that at least prior to *Wolman* such an issue necessitated an inquiry into not only the statute's "primary" effect but also its "direct and immediate" effect. 461 F. Supp. at 1126-27. The district court further acknowledged that (again, at least prior to *Wolman*) *Meek* "virtually mandated" the conclusion that the 1974 New York legislation had the unconstitutional effect of directly and immediately advancing religion. 461 F. Supp. at 1127. Nevertheless, the district court in *Levitt IV* proceeded to reject the *Meek-Nyquist* secular effect test and, based on *Wolman*, adopted a "more flexible concept" of secular effect. The court stated:

> It appeared to us that in *Meek* the Court . . . was establishing a *per se* rule prohibiting any State aid to educational activities carried out in sectarian schools . . . Applied consistently, *Meek* would allow only State aid coming under the mantle of "general welfare" programs serving the health and safety of school children.
>
> . . .
>
> *Although Wolman does not expressly renounce Meek's theory that aid to a sectarian school's education activities is per se unconstitutional, it does revive the more flexible concept that State aid may be extended to such a school's educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views.* . . . It is this concept which we apply to the provisions of the statute before us. [461 F. Supp. at 1127 (emphasis added.)]

Analyzing the 1974 legislation under this "more flexible concept," the district court found that the statute indeed had a "primary secular effect" and accordingly reversed its earlier position in *Levitt II* and upheld the statute.

Levitt IV was appealed directly to the Supreme Court, where it became the *Regan* case. The appellants argued that the district court's application of a "more

flexible concept" was contrary to *Meek*. Justice White, who authored the majority opinion in *Regan*, disagreed. He first recognized that the district court had adopted a "more flexible concept" of secular effect, 444 U.S. at 653, but then attempted to explain why such a test was not necessarily inconsistent with *Meek*:

> The difficulty with [appellants'] position is that a majority of the Court, including the author of *Meek v. Pittenger* [Justice Stewart], upheld in *Wolman* a State statute under which the State, by preparing and grading tests in secular subjects, relieved sectarian schools of the cost of these functions, functions that they otherwise would have had to perform themselves and that were intimately connected with the educational processes. Yet the *Wolman* opinion at no point suggested that this holding was inconsistent with the decision in *Meek*. Unless the majority in *Wolman* was silently disavowing *Meek*, in whole or in part, that case was simply not understood by this Court to stand for the broad proposition urged by appellants and espoused by the District Court in *Levitt II*.
>
> [444 U.S. at 661.]

The *Regan* Court went on to affirm the district court's judgment in *Levitt IV* that New York's testing reimbursement program was valid under the Establishment Clause.

Although Justice White asserted that *Regan's* "more flexible concept" of secular effect did not mean that *Meek* (and accordingly *Nyquist*) had been undercut, his assertion is unpersuasive. As noted earlier, Professor Tribe believes that the "remote and incidental" secular effect test of *Nyquist* footnote 39 was essentially a "no aid" approach to the Establishment Clause. Professor Tribe's conclusion is borne out by *Meek*, with its statement that "any substantial aid" to nonpublic, predominantly church-affiliated schools violates the secular effect test. Had the *Meek-Nyquist* "no aid" formulation been followed in *Wolman* and *Regan*, it is difficult to see how the programs challenged in those cases could have been upheld, since those programs undoubtedly afforded "substantial," "direct," and "immediate" aid to church-related elementary and secondary schools, as those concepts were employed in *Nyquist* and *Meek*. Justice Blackmun, dissenting in *Regan* (in an opinion joined by Justices Brennan and Marshall and in which Justice Stevens concurred) expressed just this difficulty. He argued that the legislation upheld by *Regan* involved the same sort of "direct" and "substantial" aid that was prohibited by *Meek* and *Nyquist*. 444 U.S. at 668. Justice Blackmun could rationalize this inconsistency only by concluding that certain of the Justices previously hostile to assistance for nonpublic education had undergone a change of heart:

> [T]he line, wavering though it may be, was indeed drawn in *Meek* and in *Wolman*, albeit with different combinations of Justices, those who perceive no barrier under the First and Fourteenth Amendments and who would rule in favor of almost any aid a state legislature saw fit to provide, on the one hand, and those who perceive a broad barrier and would rule against aid of almost any kind, on the other hand, in turn joining Justices in the center on these issues, to make order and a consensus out of the earlier decisions. Now, some of those who joined in *Lemon*, *Levitt I*, *Meek*, and *Wolman* in invalidating, depart and validate. I am able to attribute this defection only to a concern about the continuing and emotional controversy and to a persuasion that a good-faith attempt on the part of a state legislature is worth a nod of approval.
>
> [444 U.S. at 663-64 (Blackmun, J., dissenting).]

Despite Justice White's claim that *Regan* and *Wolman* are consistent with *Meek* and *Nyquist*, Justice Blackmun appears to have gotten the better of the

argument. *Regan* and *Wolman* simply did not apply the "no aid" secular effect test of *Meek* and *Nyquist* footnote 39. That was the express conclusion of not only Justices Blackmun, Brennan, Marshall, and Stevens, in dissent in *Regan*, but also of the district court in *Levitt IV* and the later decision in *National Coalition for Public Education v. Harris*, 489 F. Supp. 1248, 1269 n.14 (S.D.N.Y. 1980). A majority of the Court has rejected the *Meek-Nyquist* "no aid" "remote and indirect" formulation and instead has adopted a secular effect standard by which governmental assistance for nonpublic education will satisfy the secular effect element if, according to *Regan*, it can be "shown with sufficient clarity that . . . [such assistance will] serve the State's legitimate secular ends without any appreciable risk of being used to transmit or teach religious views." 444 U.S. at 662. This "appreciable risk" test, of course, reflects merely the *Regan* Court's adoption of the "more flexible concept" of secular effect developed in *Wolman* and recognized by the district court in *Levitt IV*.

5. Regan, Wolman, And The Continued Viability Of Nyquist

The secular effect standard thus has evolved from the relatively permissive "primary effect" tests of *Everson*, *Tilton*, and *Allen*, to the strict "no aid" test of *Nyquist* and *Meek*, and back to the "more flexible" *Regan* "appreciable risk" approach. The importance of this trend for federal tuition tax credit legislation is considerable. *Nyquist* is the most frequently raised constitutional objection to federal tuition tax credits. Opponents of the Packwood-Moynihan proposal argue that *Nyquist* demands the conclusion that federal tuition tax credits would violate the secular effect element. As explained earlier, however, the result reached in *Nyquist* was a direct consequence of the "no aid" test embodied in footnote 39. Given that *Nyquist* footnote 39 was a dramatic transformation of prior law and that the *Nyquist* Court admitted the apparent secular effects of the legislation there being challenged, it is likely that the result reached in *Nyquist* would have been far different had the Court not adopted its "no aid" footnote 39 approach. The footnote 39 approach, however, is no longer an accurate statement of constitutional law. The *Meek-Nyquist* definition of secular effect was (at least implicitly) disavowed in *Regan*. In its place the Court has substituted *Regan's* "appreciable risk" concept.

Nyquist retained vitality only so long as the "no aid" test on which it was based remained good law. With that test now rejected, and hence with its major (if not sole) source of analytical support undercut, *Nyquist* must be considered questionable precedent for future tuition tax benefit legislation. The two post-*Nyquist* Court of Appeals decisions on tuition tax benefits—*Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980), and *Public Funds for Public Schools v. Byrne*, 590 F.2d 514 (3d Cir. 1979)—must be considered suspect for the same reason. Neither *Norberg* nor *Byrne* addressed whether the *Nyquist* formulation of secular effect remains valid. Instead, the court in each case unquestioningly accepted *Nyquist* and its footnote 39 approach, and struck down the legislation before it on that basis.

Whether or not federal tuition tax credits will be deemed to have a permissible secular effect cannot be resolved merely by reliance on *Nyquist* or the cases which unhesitantly have accepted its view of secular effect. Given the changes that have occurred in this area since *Nyquist*, the secular effect issue can be answered only by analysis of the factors which traditionally have been determinative of secular effect, in light of the *Regan* "appreciable risk" standard which at least for now governs this aspect of constitutional law.

B. Traditional Measures Of Secular Effect

1. Separability And Breadth

Although the rigor with which the secular effect element has been applied has undergone significant fluctuation from *Everson* (in 1947) to *Regan* (in 1980), the focal points of judicial inquiry into the issue have tended to remain relatively constant. Professor Tribe has suggested that two factors—"separability" and "breadth"—are of critical importance in determining whether legislation passes the secular effect test. According to Tribe, the separability factor translates into "whether the secular impact is sufficiently separable from the religious" impact. *Tribe, supra*, at 840. His breadth analysis concerns the class of persons benefited by the legislation: whether "religious enterprises are benefited no more than, and only as part of, some much broader category." *Tribe, supra*, at 845. Both factors are premised on a rationale of "symbolic identification" by the public of governmental and religious activity. With respect to separability, this means that the relevant inquiry is whether the public perception of a government program is that government is "aiding" religion (rather than, for example, merely aiding individual persons without regard to their religious attitudes). *Tribe, supra*, at 843-44. Similarly, the hypothesis with respect to the breadth factor is that "the broader the class benefited, the less likely it is that the program will be perceived as aid to religion." *Tribe, supra*, at 845.

2. Separability And The Child Benefit Doctrine

Perhaps the clearest example of the significance of the separability factor is the so-called "child benefit" doctrine of *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968). In *Everson* the Court upheld a New Jersey transportation reimbursement program, according to which parents of children attending either a public school or a nonprofit nonpublic school (all of which happened to be Roman Catholic) were reimbursed by the State for expenses incurred in transporting their children to and from school on the public transit system. Similarly, in *Allen* the Court upheld a New York statute requiring local public school authorities to loan textbooks free of charge to all students enrolled in schools which complied with the State's compulsory education law, including students attending nonpublic schools (most of which were church-affiliated).

Although the true meaning of *Everson* and *Allen* is a matter of considerable dispute even within the Supreme Court, this much is settled: the critical factor which led to a finding of constitutionality in both cases was that the assistance provided was "so separate and so indisputably marked off from the religious function" of the affected church-related schools that it could not be said to constitute impermissible "aid" to religion.

The dispute concerning *Everson* and *Allen* centers upon why the assistance in those cases was "separable" from the religious functions of the affected institutions. In *Allen* Justice White stated for the Court:

> Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose [to further the educational opportunities of all children in the State]. The law merely makes available to all children the benefits of a general program to lend school books free of charge . . . [*N*]*o funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.* Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the State-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.
>
> [392 U.S. at 243-44 (emphasis added).]

The traditional view of the "child benefit" doctrine derives from a plain reading of this language: that assistance provided to individuals, rather than to the church-related institutions which those individuals happen to attend, is not "aid" to religion and is not forbidden by the Establishment Clause.

At least three Justices subscribe to this traditional view. One, of course, is Justice White, the author of the majority opinion in *Allen*. The second is Justice Rehnquist:

> Both *Everson* and *Allen* gave significant recognition to the "benevolent neutrality" concept, and the Court was guided by the fact that *any effect from state aid to parents has a necessarily attenuated impact on religious institutions* when compared to direct aid to such institutions.
>
> . . .
>
> [T]*he impact, if any, on religious education from the aid granted* [in *Everson* and *Allen*] *is significantly diminished by the fact that the benefits go to the parents rather than to the institutions.*
>
> [*Committee for Public Education v. Nyquist*, 413 U.S. at 812-13 (Rehnquist, J., dissenting) (emphasis added).]

The third and most adamant proponent of the traditional view of the *Everson-Allen* "child benefit" concept is Chief Justice Burger. In *Lemon v. Kurtzman*, for example, he reaffirmed the vitality of the traditional view of *Everson* and *Allen* by relying upon it to distinguish the statute that was before the Court in *Lemon*:

> The . . . statute . . . has the . . . defect of providing . . . financial aid *directly* to the church-related school. This factor distinguishes *Everson* and *Allen*, *for in both cases the Court was careful to point out that . . . aid was provided to the student and his parents—not to the church-related school.*
>
> [403 U.S. at 621 (emphasis added).]

The Chief Justice's dissent in *Nyquist* contains further and comprehensive documentation of the constitutional validity of the *Everson-Allen* principle that assistance to individuals is not "aid" to religion:

> While there is no straight line running through our decisions interpreting the Establishment and Free Exercise Clauses of the First Amendment, *our cases do . . . lay down one solid, basic principle: that the Establishment Clause does not forbid governments, state or federal, to enact a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that "aid" religious instruction or worship.*
>
> . . .
>
> [T]he Court in both . . . [*Everson* and *Allen*] specifically acknowledged that some children might not obtain religious instruction but for the benefits provided by the State. Notwithstanding, the Court held that such an indirect or incidental "benefit" to the religious institutions that sponsored parochial schools was not a conclusive indicium of a "law respecting an establishment of religion."
>
> . . .

> [G]overnment aid to individuals generally stands on an entirely different footing from direct aid to religious institutions. I say "generally" because it is obviously possible to conjure hypothetical statutes that constitute either a subterfuge for direct aid to religious institutions or a discriminatory enactment favoring religious over non-religious activities. . . . *But, at least where the . . . law is genuinely directed at enhancing a recognized freedom of individuals, even one involving both secular and religious consequences, such as the right of parents to send their children to private schools, . . . the Establishment Clause no longer has a prohibitive effect.*
>
> [*Committee for Public Education v. Nyquist*, 413 U.S. at 799-802 (Burger, C.J., dissenting) (emphasis added).]

Federal tuition tax credit legislation such as the Packwood-Moynihan proposal undoubtedly would be approved under this traditional view of *Everson* and *Allen*. The tax benefits provided by Senate Bill 550 would accrue to parents, not to the schools to which those parents send their children. According to *Everson* and *Allen*, there would be no *direct* benefits to religious institutions. Indeed, it cannot be said with any certainty that federal tuition tax credits would even *indirectly* accord financial benefits to church-related schools, since any additional expendable monies which parents may enjoy on account of the credits could be spent as the parents choose. In other words, given this spending freedom there is no guarantee that the tax savings would end up in the hands of religious schools. The only indirect assistance that church-related schools would receive by virtue of Senate Bill 550 would be an increased likelihood that parents would send their children to nonpublic rather than public schools. Such assistance is the very sort which the Court in *Everson* and *Allen* held does not contravene the Establishment Clause. According to the reading of *Everson* and *Allen* espoused by Chief Justice Burger and Justices White and Rehnquist, federal tax credits for nonpublic school tuition are not constitutionally distinguishable from, for example, financial reimbursements for nonpublic school transportation.

At least one Justice, however, disagrees with the Burger-White-Rehnquist reading of *Everson* and *Allen*. Justice Powell apparently believes that the "separability" found to exist in *Everson* and *Allen* derived not from the fact that the benefits went to parents and children rather than to schools, but from some other element. The Powell approach has its origins in (not surprisingly) the *Nyquist* decision (of which Justice Powell was the author). The State in *Nyquist* argued that since the benefits of New York's tuition reimbursement and tuition tax benefit programs accrued directly to parents, not to schools, those programs should be acceptable under the authority of *Everson* and *Allen*. Justice Powell, however, believed that those cases did not create an irrebuttable presumption of constitutionality. Instead:

> It is true that in . . . [*Everson* and *Allen*] the Court upheld laws that provided benefits to children attending religious schools and to their parents . . . . But those decisions make clear that, far from providing a *per se* immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to schools is only one among many factors to be considered.
>
> [*Committee for Public Education v. Nyquist*, 413 U.S. at 781.]

Up to this point Justice Powell's reading of *Everson* and *Allen* is not particularly significant. He merely disagrees with the proponents of the traditional view of those cases on the weight to be accorded disbursement of educational assistance to parents rather than to schools. Whereas Burger, White, and Rehnquist would

find such direct disbursement to be conclusive on the question of constitutionality, Powell would consider it as only a factor favoring but not compelling constitutional validity.

The difficulty with Justice Powell's approach to the child benefit doctrine stems from how he would rebut the *Everson-Allen* "presumption" of validity. In *Nyquist* he argued that, whereas the programs in *Everson* and *Allen* were clearly separable from the religious functions of the institutions indirectly benefited by those programs, the New York legislation contained no similar "guarantee of separation between religious and educational functions." Justice Powell's assertion in this regard is questionable. Since the financial benefits of New York's programs accrued directly to parents, there was no reason to believe that the tuition reimbursements or tax savings would necessarily end up in the hands of church-related schools. Eligible parents were free to spend the tuition reimbursements or tax savings as they saw fit. Moreover, New York allowed tuition reimbursements for only a portion of the tuition expenses incurred by parents, and there was evidence that this partial reimbursement could be allocated to the secular function performed by church-related schools apart from their religious mission. In light of these factors, a strong argument could be (and was) forwarded that the New York legislation contained a sufficient "guarantee of separation," such that any indirect benefit received by church-related schools on account of New York's programs was of the type approved in *Everson* and *Allen*. Justice Powell recognized these and other "secular" effects. To overcome them he resorted to what previously has been termed his "great majority" argument, that even presumptively acceptable secular effects are forbidden if the "great majority" of schools indirectly benefited thereby are "significantly religious." As support for this analysis Justice Powell appended to it none other than footnote 39, in which he laid the foundation for the "no aid" secular effect test which reached its pinnacle in *Meek* and subsequently was rejected in *Regan*.

Careful reading of this portion of Justice Powell's *Nyquist* opinion reveals that the "no aid" formulation of footnote 39 was crucial to his attempt to distinguish *Everson* and *Allen*. Justice Powell's use of the "great majority" argument to support his reading of *Everson* and *Allen* would appear to be consistent with a "no aid" rationale such as that expressed in footnote 39. As shown earlier, however, the footnote 39 standard can no longer be considered an accurate statement of Establishment Clause doctrine. The "great majority" analysis employed in *Nyquist* must be considered similarly suspect. All that definitively remains of Justice Powell's analysis in *Nyquist* of the *Everson* and *Allen* cases is his initial proposition that direct disbursement to parents is a factor favoring but not compelling constitutionality.

Unfortunately, the Court has not recently had occasion to consider, in a full opinion, the child benefit doctrine of *Allen* and *Everson*. In *Americans United for Separation of Church and State v. Blanton*, 434 U.S. 803 (1977), however, the Court hinted that it had returned to the classic reading of *Allen* and *Everson*, as urged by the Chief Justice and Justices White and Rehnquist. *Blanton* was a summary affirmance of a decision of the United States District Court for the Middle District of Tennessee which upheld a state student assistance program. 433 F. Supp. 97 (M.D. Tenn. 1977). The principal basis for the district court's decision in favor of the legislation was the fact that, like *Everson* and *Allen*, "the emphasis [was] . . . on the student rather than the institution." 433 F. Supp. at 104. As noted earlier, if this sort of analysis is applied to the Packwood-Moynihan proposal, the legislation undoubtedly would be found constitutional.

Even according to what remains of Justice Powell's reading of *Everson* and *Allen*, it would appear that federal tuition tax credit legislation would receive favorable constitutional treatment. The fact that tax benefits under the Packwood-Moynihan proposal would accrue directly to parents, according even to Justice Powell, favors a finding of validity, on the ground that such direct disbursement to

parents is at least presumptively indicative of a "guarantee of separation" between the assistance provided and the religious functions of whatever church-related institutions may be incidentally benefited. Although the Powell application of the "child-benefit" doctrine leaves open the possibility that other aspects of the legislation may be so constitutionally infirm as to require discarding the *Everson-Allen* presumption of validity, there is nothing in the current version of the Packwood-Moynihan proposal which would suggest that such infirmities exist. This conclusion appears to be particularly true in light of the other factors, considered below, which support the constitutionality of federal tuition tax credits.

3. Separability And Allocation Of Aid To Secular Functions

It is settled that nonideological assistance to nonpublic education does not contravene the Establishment Clause. *Cf. Tilton v. Richardson*, 403 U.S. 672, 683 (1971). In the *Regan* case, for example, reimbursements to nonpublic schools for costs incurred in conducting State-required testing and in maintaining records necessary for compliance with State minimum education standards were approved because such activities, even when undertaken by church-related schools, are religiously neutral. As the court stated in *National Coalition for Public Education v. Harris*, 489 F. Supp. 1248, 1259 (S.D.N.Y. 1980): "Cases such as *Regan*, *Hunt* [*v. McNair*, 413 U.S. 734 (1973)], and *Tilton* reveal that under certain circumstances the government may furnish funds or services directly to a sectarian institution if their use is effectively restricted to non-religious functions and activities."

The premise underlying the principle applied in *Regan* and *Harris* is that even church-related schools have more than just a religious function. To state the obvious, nonpublic schools provide a basic secular education to their pupils. Even church-related schools, in other words, have a clearly definable secular function. To the extent (and it is a large one) nonpublic schools engage in providing a basic secular education, they are fulfilling and advancing a public purpose which otherwise would be satisfied by government. According to the *Regan-Harris* principle, governmental assistance to this secular nonideological function should be constitutional, since such assistance promotes only the clearly identifiable secular function of providing a basic education and otherwise is religiously neutral.

The Packwood-Moynihan proposal would appear to fall on the side of permissible aid to nonideological education rather than impermissible aid to religious training. Senate Bill 550 does not permit a tax credit for *all* tuition paid to a nonpublic school. The allowable credit is specifically limited to no more than 50% of the tuition paid (and even then, to a maximum of $1000). This 50%, in turn, certainly can be said to be allocable to tuition payments made by parents for the basic secular education functions (not the religious training functions) performed by nonpublic schools. Senate Bill 550 supports this conclusion. It states that its purpose is to promote equal opportunity for basic education, not religious training. Accordingly, the tax credits allowed by the Packwood-Moynihan proposal can be seen as relating to and furthering only the nonideological aspects of nonpublic schooling.

A similar argument admittedly was made and rejected in *Nyquist*. It failed there, however, for a reason inapplicable to the Packwood-Moynihan proposal. The tuition tax benefit legislation invalidated in *Nyquist* involved no relationship whatsoever between the amount of tax benefit allowed and the amount of nonpublic school tuition actually paid. *Committee for Public Education v. Nyquist*, 413 U.S. at 766. For example, under the New York program a parent whose adjusted gross income was $9,000 could deduct $1,000 for each child for whom nonpublic school tuition was paid, regardless of whether the amount of tuition paid was $50 or $5,000. 413 U.S. at 765-66 nn.18-19. This factor was critical to the Court's decision. It stated: "The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on

the basis of a formula contained in the statute." 413 U.S. at 790. Indeed, the Court went even further to characterize the amount of the deduction as an *"arbitrary amount."* 413 U.S. at 791. Given such arbitrariness, there was no certain way to determine whether the net tax benefit afforded by the New York legislation was allocable to tuition paid only for nonideological basic education functions or whether it also reflected amounts paid for religious training. If the latter, such a tax benefit would of course be unconstitutional. For instance, in the example given above, the $1,000 deduction would result in a net savings of $50. 413 U.S at 766 nn.18-19. If the total tuition paid was only $50, then the $50 net tax benefit would support not only the secular basic education functions of the school to which tuition was paid, but also the religious training functions of that school.

The tuition tax benefit statutes confronted in the post-*Nyquist* cases in which such programs were found unconstitutional also were susceptible of being criticized as "arbitrary" in the amount of tax benefit allowed. In the Minnesota case, for example, the legislation permitted a tax credit equal to an amount fixed by the statute or the *total* amount of tuition actually paid, whichever was the lesser. *Minnesota Civil Liberties Union v. Minnesota*, 224 N.W.2d at 345-46. If the statutorily fixed amount was claimed, the result would be the same as in *Nyquist:* no possible relation to the amount of tuition actually paid. And if the actual total cost formula was employed, there clearly would be a subsidization of costs for both basic education and religious training. The statute at issue in the *Norberg* case suffered from an identical deficiency. It permitted a deduction from gross income of either an amount fixed by the statute or the total tuition paid, whichever was lesser. *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d at 857. Finally, in the *Byrne* case the New Jersey legislation in question allowed a straight $1,000 deduction from gross income for each child attending a nonpublic school, regardless of the amount of tuition actually paid to that school. *Public Funds for Public Schools v. Byrne*, 590 F. 2d at 516. In each case the fact that the legislation was "arbitrary" with respect to the amount of tax benefit allowed was grounds to find a lack of sufficient separation between the educational assistance provided and the religious training functions of the affected church-related schools.

Senate Bill 550, on the other hand, cannot be attacked as "arbitrary." By limiting the maximum allowable credit to no more than 50% of tuition actually paid (and even then to no more than $1,000), the Bill evinces not a lack of separation between the assistance provided and religious functions, but a carefully drawn mechanism to ensure that such separation exists. With such a ceiling on the amount of credit which can be claimed, it would be impossible for any resulting tax benefit to reflect costs for religious training. The Packwood-Moynihan proposal is obviously and easily distinguishable from the statutes challenged in *Nyquist, Norberg, Byrne*, and the Minnesota case. Unlike those statutes, Senate Bill 550 would accord a tax benefit only for tuition paid for the basic secular education functions of nonpublic schools. Even if such a tax benefit is perceived as "aid" to schools rather than parents, being separable, it should be constitutional.

4. Separability And Affirmative Government Assistance

On the one hand, direct payment by government to church-related schools to further the religious missions of those schools is undoubtedly impermissible. At the other extreme, exemption of religious organizations from legal requirements incumbent upon similarly situated nonreligious organizations can, under certain circumstances, be constitutional. *Cf. Walz v. Tax Commission*, 397 U.S. 664 (1970). Indeed, in some cases such an exemption of religious "persons" (whether corporate or natural) may be mandated by the free exercise guarantee. *Cf. Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

Keeping in mind that the rationale underlying the secular effect test's separability concern is to avoid a "symbolic identification" between government and religion, it seems clear that there is a greater likelihood of such identification

when government takes affirmative steps to provide direct assistance (such as the direct payment of money) to religiously affiliated institutions. Conversely, that likelihood diminishes significantly when "aid" is not affirmative but consists merely of government abstention from imposing a legal burden which otherwise could be imposed (such as exempting religious organizations from a tax which otherwise could be levied on them). In the latter case, since there is no positive governmental action, there is less chance that government will be seen as taking steps to sponsor religion. Such a distinction between (presumptively impermissible) affirmative and direct assistance, on the one hand, and (presumptively permissible) indirect and exemptive government conduct, on the other hand, was recognized (albeit in slightly different terms) by the courts in *Kosydar v. Wolman*, 353 F. Supp. 744, 763 (S.D. Ohio 1972), *aff'd mem. sub nom. Grit v. Wolman*, 413 U.S. 901 (1973), and *Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316, 1321 (D. Minn. 1978).

On which side of this distinction would the Packwood-Moynihan proposal fall? The question is a difficult one. *Cf. Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. at 1321. Nevertheless, it appears that federal tuition tax credits would be more in the nature of exemptive governmental activity and hence constitutional. In the *Roemer* case, for example, the court relied upon just this factor in upholding a tuition tax deduction statute. 452 F. Supp. at 1321-22. Perhaps more importantly, Chief Justice Burger found this affirmative-exemptive distinction to militate strongly in favor of the tax exemptions for churches upheld in *Walz*. The Chief Justice stated:

> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit. . . . [But the] grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. . . . *There is no genuine nexus between tax exemption and establishment of religion.* . . . The exemption creates only a minimal and remote involvement between church and state.
>
> [*Walz v. Tax Commission*, 397 U.S. at 674-76 (emphasis added).]

There would appear to be no material difference between the tax "exemption" of *Walz*, the tax "deduction" of *Roemer* (both of which were held constitutionally valid), and the tax "credit" of the Packwood-Moynihan proposal. All three in essence involve alleviation of a tax burden by not collecting a tax which otherwise could be levied. It is possible, of course, that a low-income taxpayer who takes a tax credit may be entitled to a payment from the government, but that result reflects no more than the taxpayer's overall tax status, of which a tax credit for one item is merely a part. The tax credit alone, like any exemption or deduction, requires no affirmative steps on the part of government. Indeed, the similarity between the measures approved in *Walz* and *Roemer* and the tax credit of Senate Bill 550 is reinforced by *Nyquist*. There the Court noted that it makes no constitutional difference whether a tax measure is termed a "deduction," a "credit," or even a "modification." 413 U.S. at 789-90. Instead, substance must control over form. 413 U.S. at 790.

Nyquist's invalidation of New York's tuition tax benefit program, moreover, does not cut against the conclusion that a merely exemptive tax measure, such as Senate Bill 550 (or the measures approved in *Walz* and *Roemer*), is constitutionally valid. The tax benefit program struck down in *Nyquist* was not enacted nor did it exist in isolation. It was part and parcel of a much broader plan which included New York's tuition reimbursement grant program (which involved direct and affirmative payment of government monies). As the Court noted, the tuition tax benefit sections of the challenged New York legislation were intended to be "com-

parable to and compatible with the tuition grant" sections. 413 U.S. at 790. The Court noted further that, given this close relationship between the two programs, if the tuition grant measure was unconstitutional then the tax benefit measure also must be stricken. 413 U.S. at 791 n.50. To a large extent, then, the constitutional defects in New York's tuition tax benefit program were a function of that program's "legally inseparable" ties to the tuition grant program. 413 U.S. at 791 n.50. Whether the tax benefit plan would have been held unconstitutional absent those ties is debatable, although *Roemer* and particularly *Walz* indicate that such a purely or at least predominantly exemptive tax measure would be permissible. And in any event, the unique aspects of the integrated legislation at issue in *Nyquist* prevent that decision from having considerable precedential weight on this question. The more relevant precedents are *Walz* and *Roemer*, and they favor the conclusion that predominantly exemptive measures, such as Senate Bill 550, are constitutional.

5. Breadth, National Legislation And Genuine Tax Benefit Programs

Whereas the *Nyquist* Court purported to rest a good part of its ruling on the separability factor and the assertion that sufficient separation cannot exist if assistance to nonpublic education has a "significantly religious" flavor, the Court explicitly avoided consideration of the "breadth" aspect of the secular effect test. Indeed, in one footnote it observed that its decision should not be construed as extending to legislation, such as the GI Bill of Rights, 38 U.S.C. § 1651, which accords educational assistance to a broad class of beneficiaries. 413 U.S. at 782 n.38. Perhaps more importantly, in another footnote the Court indicated that a "genuine" tax benefit program, such as that for charitable contributions found in I.R.C. § 170, would survive constitutional scrutiny.

a. National Legislation

It is interesting that both of the examples to which the Court referred in limiting the scope of *Nyquist* involved *national* legislation, whereas *Nyquist* and the other cases which have invalidated tuition tax benefit programs have concerned *state* legislation. This distinction between the sources of legislation challenged under the Establishment Clause is highly significant to the breadth aspect of the secular effect test. Given that the underlying concern of the breadth factor is avoidance of any symbolic identification by the general public between governmental assistance and religious activity, it seems apparent that facially neutral legislation at the national level, directed at a broad cross-section of the nation's population, is less likely to involve any such symbolic identification.

The purpose of tuition tax benefit legislation is to preserve educational opportunity for all persons, without regard to religious persuasion. Yet, in a state where the beneficiaries of such legislation are highly concentrated into a few denominations, or even where the entire constituency of the state is comprised predominantly of persons adhering to only a handful of religious beliefs, such a purpose likely will not be achieved, at least not in a neutral fashion. As the Court (albeit perhaps wrongly) noted in *Nyquist*, under such circumstances the primary beneficiaries of the legislation would not be all persons regardless of religious attitude, but a select group of certain, politically powerful religious adherents.

For example, in New York at the time of the *Nyquist* decision there were 2,038 nonpublic schools. The vast majority, 1,942 (85%), were church-affiliated, and 1,415 of these schools were all related to one faith. 309 of the remainder were concentrated among four other religions. 413 U.S. at 768 n.23. Putting aside all of the other aspects of *Nyquist*, it is obvious that under these circumstances the New York legislation would have predominantly benefited persons belonging to a small group of religions.

National educational assistance legislation, by contrast, is not susceptible to this criticism. Such legislation (including the Packwood-Moynihan proposal) would accrue to the benefit of persons of all religious beliefs, regardless of geographic distributions or concentrations. Indeed, national religious diversity serves to ensure proportionate representation in the national legislature, a factor which likely would not exist in the legislatures of states in which certain faiths are highly concentrated. Religiously proportionate representation and distribution of benefits, in turn, permit federal legislation to coincide more closely with the goal of preserving freedom of educational choice. The simple fact that such legislation is national in character guarantees that the class of beneficiaries will be far broader than any class which could possibly be benefited by comparable state legislation. Professor Antonin Scalia of the University of Chicago aptly summarized this principle in his testimony during Senate Finance Committee hearings on federal tuition tax credit legislation:

> [A] final distinction, perhaps the most critical, between the present bill [S. 2142] and the laws struck down in *Nyquist* . . . is that here we are talking about a federal law. It is unquestionable that the Supreme Court—in this field even more than in most—is more disposed to accord validity to the acts of this Congress than to those of state legislatures.
>
> . . .
>
> In the individual states, where, not infrequently, a single denomination accounts for a majority or a near majority of the electorate, the danger that the legislature will aid a particular religion under the guise of pursuing purely secular, governmental ends is sometimes acute, and justifies particularly rigorous application of anti-establishment principles, even at the expense of other constitutional values which might otherwise predominate. In the national legislature, by contrast, no single religious sect predominates and the danger of sectarian action in favor of a particular group is negligible.
>
> [*A. Scalia, Testimony Before Sen. Finance Comm. Hearings*, Jan. 18-20, 1978, *reprinted in* 33 *Origins* 513, 516 (Feb. 1978).]

The Supreme Court has indicated that national legislation is entitled to greater judicial deference under the Establishment Clause because of just this factor. In *Wheeler v. Barrera*, 417 U.S. 402 (1974), *judgment modified*, 422 U.S. 1004 (1975), for example, the Court ruled that *federal* legislation such as Title I of the Elementary and Secondary Education Act of 1965 which provides equal services to both public and nonpublic school students does not necessarily violate the Constitution. Similar reasoning was expressed in *Tilton v. Richardson*, 403 U.S. 672 (1971), which upheld Title I of the Higher Education Facilities Act of 1963, and more recently in *Harris v. McRae*, 448 U.S. 297 (1980), which upheld the Hyde Amendment to Title XIX of the Social Security Act. *See also National Coalition for Public Education v. Harris*, 489 F. Supp. 1248 (S.D.N.Y. 1980). This same judicial deference to national legislation should, of course, be equally applicable to the Packwood-Moynihan proposal.

b. Nyquist Footnote 38 And The Blanton Decision

The rationale of *Wheeler*, *Tilton* and *McRae* was the obvious referent of the *Nyquist* Court when it stated in footnote 38:

> [W]e need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-

> nonsectarian, or public-nonpublic nature of the institution benefited. . . . Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the "G.I. Bill" . . . impermissibly advance religion in violation of the Establishment Clause.
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> [413 U.S. at 782 n.38.]

The significance of *Nyquist* footnote 38 was confirmed in *Americans United for Separation of Church and State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn.), *summarily aff'd*, 424 U.S. 803 (1977). The three judge federal court, whose decision was affirmed by the Supreme Court, was considering the constitutionality of a higher education student assistance grant program, but the rationale would apply to Senate Bill 550. In affirming the constitutionality of the student assistance grant program, the *Blanton* court referred to a South Carolina Supreme Court case that was dismissed for lack of a substantial federal question *(Durham v. McLeod*, 413 U.S. 902 (1973)), on the same date that *Nyquist* was decided:

> In the instant case, as in *Durham*, the emphasis of the aid program is on the student rather than the institution, and the institutions are free to compete for the students who have money provided by the program. *No one religion is favored by the program, nor are private or religious institutions favored over public institutions.*
>
> [433 F. Supp. at 104 (emphasis added).]

Blanton thus upheld the legislation because it accorded benefits to a broad class of beneficiaries. The Packwood-Moynihan proposal, which would be a mere part of the much broader Internal Revenue Code, would have a similar effect. Additionally, *Blanton* involved *state* legislation. As noted above, federal legislation such as Senate Bill 550 inherently carries with it greater "breadth" than comparable state enactments. Hence, the *Blanton* rationale should hold even more persuasive with respect to the Packwood-Moynihan proposal. This is particularly true since, as detailed below, there is abundant federal legislative precedent for Senate Bill 550 which indicates that its effect would be broad-ranging enough to dismiss the fear that it involves impermissible religious benefits.

c. Legislative Precedent For Federal Tuition Tax Credits

One need not search far to find congressional precedent for legislation such as that reflected in the Packwood-Moynihan proposal. In 1943 President Roosevelt sent two messages to Congress urging the development of legislation aimed at easing the burdens of returning servicemen. On June 22, 1944, Congress responded by enacting the first so-called "GI Bill." Among other things, this bill provided for educational assistance payments to veterans who wished to complete or continue their education. The current legislation providing educational assistance benefits for veterans and their families is embodied in Chapters 34 and 35 of Title 38 of the United States Code.

38 U.S.C. § 1681 provides for the payment of a specified amount each month to any qualified veteran "to meet, in part, the expenses of his subsistence, tuition, fees, supplies, books, equipment and other educational costs." Moreover, Congress has authorized payments to educationally disadvantaged veterans who desire to complete *high school* or who need tutorial or other remedial assistance in order to begin college. 38 U.S.C. §§ 1691 and 1692 provide for monthly payments to such veterans in an amount equal to that paid under 38 U.S.C. §§ 1681 and 1682.

Nor has Congress ignored the educational needs of families of dead or disabled veterans. 38 U.S.C. § 1731 calls for monthly payments to parents or guardians of *children* whose fathers were killed or disabled in the military service of our country. Such payments are "to meet, in part, the expenses of the eligible person's

subsistence, tuition, fees, supplies, books, equipment, and other educational costs."

Each of these provisions for educational assistance payments to individuals applies with equal force in the instance of attendance at church-related schools. The surviving war orphan who attends a church-related school receives precisely the same check each month from the federal government as the war orphan who attends public school. Literally thousands of checks have been sent by "Uncle Sam" to persons and parents of persons who attended church-related schools pursuant to these federal programs. No court has ever condemned Congress for trying to "establish" a church by making such payments to individuals.

Another indication of congressional thinking about the validity of educational assistance payments to parochial school children appears in 2 U.S.C. §§ 88a and 88b, which provide for reimbursement to the District of Columbia public school system for its costs in providing a high school education to pages of the United States Supreme Court and Congress and for all other minors who are congressional employees. The statute further provides appropriate reimbursement when such youngsters elect to attend private or parochial high schools. 2 U.S.C. § 88c.

The federal government also makes direct educational assistance payments each month to senior R.O.T.C. students and even pays the full tuition of selected four-year R.O.T.C. students. 37 U.S.C. § 209 and 10 U.S.C. § 2107. The R.O.T.C. cadet at Notre Dame receives the same check as his counterpart at Ohio State. No one has ever labeled this an "establishment" of religion.

Another precedent, of course, lies in the federal government's exemption of religious organizations from income tax (I.R.C. § 501(C) (3)) and in the deduction treatment given to charitable contributions under the Internal Revenue Code (I.R.C. § 170). The history of these exemptions and deductions reveals a legislative conviction that the loss of revenue is more than offset by the relief from financial burdens which the government otherwise would have to meet by appropriations from public funds:

> The government is compensated for its loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from public funds.
>
> [*H. Rep. No.* 1860, 75th Cong., 3d Sess. 19 (1938).]

The Supreme Court spoke of the validity of tax deductions for gifts to religious, educational, and other charitable objects in *Helvering v. Bliss*, 293 U.S. 143 (1934):

> In the Act of October 3, 1917, Congress, in order to encourage gifts to religious, educational and other charitable objects, granted the privilege of deducting such gifts from gross income, but limited the total deduction to 15 per cent of the taxpayer's net income, calculated in the first instance without reference to the amount of such contributions. All of the later Acts have contained a like provision.
>
> [293 U.S. at 147.]

The Court, in other words, apparently finds no constitutional objection to tax benefits for charitable contributions to religious institutions. The "effect" of such a tax benefit is, of course, no different than that which would be forthcoming from the Packwood-Moynihan proposal.

The federal government, through the Internal Revenue Code, has historically provided tax credit incentives for individual accomplishment of public purposes; and the Supreme Court has reflected an extreme reluctance to interfere with legislative flexibility with respect to tax decisions. The Court in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 494 (1937), stated:

> *It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions.* Neither due process nor equal protection imposes upon a state any rigid rule of

equality of taxation . . . . This court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation.

• • •

Like considerations govern exemptions from the operation of a tax imposed on the members of a class. *A legislature is not bound to tax every member of a class or none.* It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.

[301 U.S. at 509-10 (emphasis added).]

Congressional discretion in levying and collecting taxes, a power which is explicitly conferred by Article I, Section 8 of the Constitution, is subject to even fewer restraints than are imposed upon the decisions of state legislatures. *Steward Machine Co. v. Davis*, 301 U.S. 579, 581 (1937). As the Court noted in *Gibbons v. District of Columbia*, 116 U.S. 404, 408 (1886), in the exercise of its taxing power "Congress . . . may at its discretion wholly exempt certain classes of property from taxation." *Gibbons* was cited by the Court in *Walz* to support its conclusion that property tax exemptions for religious institutions are constitutionally permissible. The same reasoning should carry over to federal tuition tax credits.

Numerous other congressional enactments comparable to Senate Bill 550 could be cited. The point is that broad-reaching legislation, particularly when national in origin and concerned with tax burdens and benefits, is not unconstitutional under the Establishment Clause. Such legislation simply does not entail the "symbolic identification" between church and state which that Clause (and particularly its secular effect component) seeks to avoid.

Senate Bill 550 is *national* in origin. It is *tax* legislation. Its benefits will accrue to *all* persons who wish to take advantage of its provisions, not just religious persons. It appears to satisfy each of the criteria touched upon above, and accordingly should not be seen as constitutionally suspect.

C. Alternative Bases For Finding Secular Effect

Although the separability and breadth considerations are central to any analysis of whether legislation has a permissible secular effect, they are not necessarily the sole considerations. Two further factors provide additional and alternative bases for the conclusion that federal tuition tax credit legislation would have a constitutional secular effect.

1. Federal Tuition Tax Credits And Preferential Treatment

In breathing content into the Religion Clauses (and particularly into the Establishment Clause) the Supreme Court has relied extensively upon the intent of the Framers of the First Amendment. *Tribe, supra*, at 826; Summers, *The Sources and Limits of Religious Freedom*, 41 Ill. L. Rev. 53, 55-58 (1946). At the time the First Amendment was adopted, "official" state religions and churches supported by state revenues were commonplace. C. *Antieau, Freedom From Federal Establishment* cc 1-2 (1964). These churches were, in effect, "agencies" of the various states which funded them. *W. Torpey, Judicial Doctrines Of Religious Rights In America* 171 (1948). The intent of the Framers in authoring the Establishment Clause was not to put an end to such "official" state churches; far from that, the Framers intended to protect state prerogatives to maintain their own religions by prohibiting the national government from disestablishing the "official" state churches and in their place establishing a "national" religion. Kruse, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause, 2 Washburn L.J.* 65, 84-85, 127-30 (1962); Snee, *Religious Dis-*

establishment and the Fourteenth Amendment, 1954 *Wash. U.L.Q.* 371, 373-94.

To accomplish their goal of preventing national disestablishment of state churches, the Framers did not erect a total prohibition of all federal assistance to religious interests. Instead, through the Establishment Clause the Framers sought to prevent any *preferential treatment* by Congress of one religion over another. *E. Corwin, A Constitution Of Powers In A Secular State* 116 (1951). *See J. O'Neill, Religion And Education Under The Constitution* 225 (1949). According to the Founding Fathers, the Establishment Clause permitted federal aid to religious interests so long as such aid was not disbursed in a religiously discriminatory manner. *Compare Walz v. Tax Commission*, 397 U.S. at 696 (Harlan, J., concurring).

The Framers' concern with religious preferences arose from their belief that religious diversity inherently leads to religious freedom. *Cf. The Federalist* No. 51 at 351-52 (J. Madison) (Cooke ed. 1961). Such pluralism, of course, would be destroyed if the strength of the federal government were placed behind one religion. For example, in the constitutional debates James Madison proposed to include among the enumerated powers of Congress the authority "to establish an University, in which *no preferences or distinctions* should be allowed on account of religion." The proposal was defeated by two votes, but only because Gouverneur Morris of Pennsylvania was able to convince the delegates it was unnecessary, since both the power to create such a university and the prohibition of religious preferences were already within the listing of enumerated congressional powers. 2 *M. Farrand, Records Of The Federal Convention Of 1787* 616 (rev. ed. 1937).

Professor Corwin has aptly summarized the "original understanding" in this regard:

> The historical record shows beyond peradventure that the core idea of "an establishment of religion" comprises the idea of *preference*; and that any act of public authority favorable to religion in general cannot, without manifest falsification of history, be brought under the ban of that phrase.
>
> [*E. Corwin, A Constitution Of Powers In A Secular State* 116 (1951) (emphasis in original).]

The Packwood-Moynihan proposal certainly does *not* involve religious "preferences" as that concept was understood and constitutionalized by the Framers. Senate Bill 550 draws no distinctions between religion and nonreligion, much less among various religions themselves. Indeed, it would be ludicrous to suggest that the proposal even remotely resembles any sort of congressional attempt to promote a "national" religion. As such, the Bill comports with the fundamental purposes of the Establishment Clause.

2. Federal Tuition Tax Credits And Preserving Freedom of Choice

Examination of the historical record of the Religion Clauses reveals more than just a concern with religious preferences. The Supreme Court itself has recognized two fundamental and guiding principles which subsist in the Clauses: "voluntarism," that matters of conscience and belief (such as religion) should be left to the free choice of the individual, without undue restraint or coercion by government; and "separatism," that church and state should remain institutionally separate and that religious disputes should not give rise to excessive political fragmentation or divisiveness. *Tribe, supra*, at 817-18. *See Walz v. Tax Commission*, 397 U.S. at 694-96 (Harlan, J., concurring).

In many respects there is an inherent conflict between these principles. *See* Young, *Constitutional Validity of State Aid to Pupils in Church-Related Schools—Internal Tension Between the Establishment and Free Exercise Clauses*, 38 *Ohio St. L.J.* 783, 785-86 (1977). On the one hand, voluntarism requires government not to burden the practice of religion. Indeed, under certain circumstances it may even require affirmative governmental action in order to alleviate the collateral coercive effects of facially neutral legislation. *Cf. Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). Separatism, on the other hand, dictates that government shall not aid the practice of religion. If either principle is applied literally, it is conceivable there will be a breach of the other. *Walz v. Tax Commission*, 397 U.S. at 669.

Because of this natural antagonism, the general rule which has evolved is one of "neutrality." "Government in our democracy, state and national, must be *neutral* in matters of religious theory, doctrine, and practice." *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) (emphasis added.) *See Everson v. Board of Education*, 330 U.S. at 16-18. In developing this rule of religious neutrality, however, the Court has never accepted the so-called "strict neutrality" which has been proposed by some, according to which "government cannot utilize religion as a standard for action or inaction because . . . [the Religion Clauses] prohibit classification in terms of religion either to confer a benefit or impose a burden." *P. Kurland, Religion And The Law* 18 (1962). Instead, the Court has adopted a position of "flexible neutrality." As Chief Justice Burger stated in *Walz*, the Religion Clauses contain "room for play in the joints productive of a benevolent neutrality." 397 U.S. at 669.

Such flexible or benevolent neutrality is essential to allow meaningful resolution of the tension between the principles which underlie the Religion Clauses. *O'Hair v. Andrus*, 613 F. 2d 931, 935 (D.C. Cir. 1979). Of the two principles, voluntarism is said to be the most fundamental (in the constitutional sense) and hence must take precedence whenever a conflict exists between the two. *Tribe, supra*, at 818; Giannella, *Religious Liberty, Non-Establishment, and Doctrinal Development*, 81 *Harv. L. Rev.* 513, 517 (1968). *Cf. Thomas v. Review Board*, 450 U.S. 707 (1981); *Walz v. Tax Commission*, 397 U.S. at 694 (Harlan, J., concurring).

The tension between voluntarism and separatism can easily be seen in the educational crisis towards which the Packwood-Moynihan proposal is directed. As noted at the outset of this memorandum, the right of parents to send their children to a nonpublic school, and particularly to a church-related school, is constitutionally protected. This parental right is at the core of those within the ambit of the voluntarism/free choice principle. Additionally, nonpublic schools play a crucial role in the overall scheme of American education. As Justice Powell noted in his separate opinion in *Wolman v. Walter*, "they relieve substantially the tax burden incident to the operation of public schools." 433 U.S. at 262. Yet, social and economic upheaval in recent decades has seriously threatened both the ability of parents to exercise their so-called constitutional right in a meaningful fashion and the ability of nonpublic schools as a whole to serve as a viable alternative to public instruction. This threat to such important values is obviously serious enough to justify government intervention in the form of exemptive assistance to nonpublic education. Such assistance, in this sense, can be seen merely as an attempt to preserve the vitality of a choice which the Supreme Court has said is deserving of constitutional protection. It is, in other words, an attempt to preserve voluntarism. Such assistance, however, also raises serious establishment and separatism concerns. Hence the resulting tension between the applicable constitutional rules.

Describing this tension as a "departure from neutrality," one commentator has aptly summarized the existing conflict between voluntarism and separatism in the context of aid to nonpublic education:

> Government taxing and spending policies create a financial incentive for parents to choose secular over religious schooling for their children. Public elementary and secondary schools are financed through local property taxes supplemented by federal and state contributions. These public schools are required by the Constitution to be entirely secular. Private religious schools cannot be reimbursed by the state for the costs of the secular aspects of their students' educations, since these are too closely bound up with the religious aspects. As a result, parents face a significant cost in choosing a private religious school, compared to no cost in choosing a public secular school.
>
> This disincentive to the choice of religious schooling represents a departure from the principle of government neutrality as developed by the Supreme Court.
>
> . . .
>
> The severity of the present departure from neutrality can be seen in its burden upon parental choice. . . . The burden on parental choice raises serious problems for the policy of voluntarism. Compulsory education laws require parents to provide some sort of education for their children; the only cost-free means of compliance is the secular public school system. Some parents, however, consider it against their religious beliefs to educate their children in a secular environment. The Supreme Court has held that such parents have a constitutional right to educate their children in religious schools that meet certain state requirements. . . . But the high cost of exercising this right is a burden on voluntarism and a departure from neutrality.
>
> [Note, *Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 *Harv. L. Rev.* 696, 700-02 (1979).]

Federal tuition tax credit legislation can be seen as a congressional attempt to remedy this departure from neutrality. Given that the voluntarism value is more fundamental than its separatism counterpart, any establishment problems created by federal tuition tax credits accordingly should be subordinated to the constitutionally higher priority of ensuring an environment in which religious liberty can have a meaningful existence. In this sense, the Packwood-Moynihan proposal, if enacted, would be a means to secure to parents their constitutional right to send their children to a nonpublic school. Its consequent "effect" thus would be promotive of constitutional norms, not violative of those embodied in the "effect" element of the Establishment Clause test.

Opponents of federal tuition tax credit legislation likely will assert that such a "voluntarism argument" was made and rejected in *Nyquist*. It is true that in *Nyquist* New York argued that "its program of tuition grants should survive scrutiny because it is designed to promote the free exercise of religion." 413 U.S. at 788. The Court nevertheless held that the program did not pass the footnote 39 secular effect standard. For two reasons, however, that holding does not necessarily mean that the "voluntarism argument" made above is not valid as to federal tuition tax benefit legislation.

First, *Nyquist's* consideration of the free exercise issue was colored (if not controlled) by its adoption of the footnote 39 "no aid" standard—the current validity of which is highly questionable to say the least. In connection with footnote 39 the *Nyquist* majority took an exceedingly narrow view of the concept of neutrality. Note, *supra*, 92 *Harv. L. Rev.* at 706-09. Instead of analyzing neutrality in terms of the overall context of government school financing, Justice Powell and the *Nyquist* majority considered only the very limited context of the specific program in question. *Cf.* 413 U.S. at 782 n.39. They looked *only* at the provisions of the legis-

lation before them. "The overall effect of the government's school financing programs—with its disincentives as well as incentives to private education—was not evaluated"; accordingly, the Court did not engage in "balancing any government-created or government-enhanced burdens on the choice of private schools against the tax incentive." Note, *supra*, 92 *Harv. L. Rev.* at 707. Such an approach, of course, was consistent with the footnote 39 test. *Cf.* 413 U.S. at 788-89. Just as Chief Justice Burger believed that footnote 39 was an unjustified statement of constitutional doctrine, he also disagreed with the majority's narrow view of neutrality and school financing. Instead, the Chief Justice (joined by Justices White and Rehnquist) would have examined the voluntarism argument in light of the cumulative effect of *all* government financing for schools:

> [New York has] . . . merely attempted to equalize the costs incurred by parents in obtaining an education for their children. . . . It is beyond dispute that the parents of public school children . . . presently receive the "benefit" of having their children educated totally at state expense; the statutes . . . at issue here merely attempt to equalize that "benefit" by giving to parents of private school children, in the form of dollars or tax deductions, what the parents of public school children receive in kind. It is no more than simple equity to grant partial relief to parents who support the public schools they do not use. [413 U.S. at 803 (Burger, C.J., dissenting).]

To the extent that the footnote 39 standard has since been disapproved, the narrow view of neutrality taken in *Nyquist* must be considered suspect. But even aside from the more permissive secular effect test now being applied by the Court, the other decisions since *Nyquist* indicate that Chief Justice Burger's broad view of neutrality is now the accepted position. *E.g., Thomas v. Review Board*, 450 U.S. 707 (1981). Particularly on point is the recent decision in *Widmar v. Vincent*, 70 L.Ed. 2d 440 (1981), in which a student religious group brought a free exercise/voluntarism challenge against a university regulation that prohibited the use of university facilities for religious worship or instruction. The university argued that to allow its facilities to be used by religious student groups would constitute an impermissible "establishment." In rejecting this argument and holding for the students, the Court relied heavily upon its observation that university facilities were made available generally to all nonreligious groups. In other words, the Court looked beyond the mere language of the law before it and considered the effect of the law in the overall context of the university's treatment of *all* student groups. Such an approach is the exact opposite of that employed by the *Nyquist* majority. It is, instead, the view advocated by Chief Justice Burger in his *Nyquist* dissent. And according to the Chief Justice's view, when tuition tax benefit legislation is examined in the broader context of all government school financing, it is clearly permissible as a means to equalize opportunities and preserve choices protected by the Constitution.

The nature and source of the legislation itself provides the second reason favoring the conclusion that, contrary to what can be read into *Nyquist*, federal tuition tax credits would be found constitutional under the voluntarism argument. *Nyquist* (and the decisions following it) involved *state* legislation. Legislative preservation of freedom of educational choice is essentially a matter of civil rights. Although the states undoubtedly are authorized to act in this area, civil rights and their protection are peculiarly the province of the federal government. *Cannon v. University of Chicago*, 441 U.S. 667, 708 (1979); *Steffel v. Thompson*, 415 U.S. 452, 464 (1974). As such, federal legislation in aid of constitutional rights (such as the Packwood-Moynihan proposal) should be entitled to greater judicial deference than that exhibited in *Nyquist*.

D. Concluding Comments: Federal Tuition Tax Credits And The Secular Effect Test

The critical issue with respect to the constitutionality of federal tuition tax credit legislation is whether it will be able to satisfy the secular effect test. While all Establishment Clause doctrine is in a state of upheaval, the secular effect element of that doctrine is particularly difficult to discern, much less to apply. It is doubtful whether any legislation even remotely benefiting nonpublic education could survive a literal reading of *Nyquist*.

Careful reading of subsequent Supreme Court opinions, however, can only lead to the conclusion that the *Nyquist* formula of secular effect is no longer being applied. The Court has retreated to the more flexible approach exemplified by the earlier decisions in *Tilton*, *Allen*, *Walz*, and *Everson*.

Federal tuition tax credits should pass the secular effect test under this more flexible approach. The Packwood-Moynihan proposal is consistent with the "child benefit" doctrine approved in *Allen* and *Everson*. For numerous reasons it seems to satisfy the "separability" and "breadth" criteria so often stressed by the Court. Additionally, Senate Bill 550 comports with the "original understanding" of what sort of government action is permissible under the Establishment Clause. And finally, it can be seen as a congressional attempt not to promote religious values but to protect the freedom of choice guaranteed by the First Amendment.

Given the confusion in this area of the law, absolute predictions as to the constitutionality of any legislation are impossible. Nevertheless, compelling and supportable arguments can be made that federal tuition tax credit legislation would have a permissible secular effect. That leaves for consideration the last element of the Court's three-part test—that of "excessive entanglements."

VII. FEDERAL TUITION TAX CREDITS AND EXCESSIVE ENTANGLEMENTS

As noted earlier, the "excessive entanglements" prong of the Court's modern test first appeared in Chief Justice Burger's rather abrupt statement in *Walz* that legislation also must avoid "excessive government entanglement with religion." 397 U.S. at 674. The following term, in *Lemon v. Kurtzman*, it became clear that excessive entanglement was a distinct and independent element of Establishment Clause analysis.

As its name suggests, the "entanglements" test is concerned principally with government *involvement* with religious interests. The Court has recognized, however, that "some involvement and entanglement is inevitable" and hence permissible. *Lemon v. Kurtzman*, 403 U.S. at 625. *Cf. Abington School District v. Schempp*, 374 U.S. at 294-95 (Brennan, J., concurring). "The test is inescapably one of degree." *Walz v. Tax Commission*, 397 U.S. at 674.

The entanglements concept itself is divided into two further inquiries: one concerning "administrative entanglements" and whether government has become directly involved in the operations of sectarian institutions; and the second concerning "political entanglements" and whether legislation creates the potential for excessive political divisiveness or fragmentation along religious lines. *Committee for Public Education v. Nyquist*, 413 U.S. at 797-98; *Tribe, supra*, at 866.

No court has ever invalidated a tuition tax benefit program on the ground that it involved an impermissible administrative entanglement, and it is extremely unlikely that a court would do so. In *Walz* the Court identified the three types of administrative involvements forbidden by the Establishment Clause: (1) substantive government evaluation of religious practices, 397 U.S. at 674; (2) "extensive state investigation into church operations and finances," 397 U.S. at 691 (Brennan, J., concurring); and (3) government classification "of what is not religious," 397 U.S. at 698 (Harlan, J., concurring). Tuition tax benefit legislation obviously

implicates none of these considerations. As noted earlier, such legislation is more in the nature of exemptive rather than affirmative governmental action. Without affirmative action, it is difficult to see how there could be any direct involvement between government and religion. Indeed, the Packwood-Moynihan proposal explicitly prohibits the suspect activities enumerated in *Walz*. As such, it certainly should pose no danger of administrative entanglements.

The political entanglements issue presents a more difficult question. All of the courts which have invalidated tuition tax benefit legislation have done so on secular effect grounds, and most of these courts did not engage in an entanglements analysis. In *Nyquist*, however, the Court did make the gratuitous observation that New York's tuition tax benefit program raised certain political entanglement problems. 413 U.S. at 794-98. *See also Kosydar v. Wolman*, 353 F. Supp. at 766-67. The *Nyquist* Court reasoned that such a program could lead to political "pressure for frequent enlargement" of the tax benefit provided. 413 U.S. at 797. "In this situation," the Court concluded, "the potential for seriously divisive political consequences needs no elaboration." 413 U.S. at 797.

"Elaboration," however, would have been most helpful, for the political divisiveness potentially created by New York's legislation was by no means obvious. The Court cited to no evidence that there had been political fragmentation along religious lines, nor even that there had been political pressure to increase the tax benefit accorded. As noted above, the summary entanglements analysis given in *Nyquist* was totally unnecessary to the Court's decision. Whatever the meaning of *Nyquist*'s vague comments on political divisiveness, however, one thing is certain: the Court was not suggesting that the Establishment Clause forbids political advocacy by religious groups. Such a position would clearly be untenable in light of the recent decision in *Widmar v. Vincent*, 70 L.Ed. 2d 440 (1981), where the Court held that religious speech and association are fully protected by the First Amendment. Similarly, in *Kosydar v. Wolman*, the Court stated:

> Nothing that this Court has said . . . should be construed as implying that advocacy by religious forces on the general political problems facing our society should be disallowed or even discouraged. To the contrary, we think the political vitality of our nation would be diminished if the right of these groups to argue their views in the legislative chambers were constricted. They have added, in the past, a moral and philosophical dimension to the political debate on issues as diverse as the war in Vietnam, population control, legislation on gambling. It is to be hoped that these contributions continue into the future.
>
> [353 F. Supp. at 767.]

Certain other aspects of the political entanglements concept are also settled, and they indicate that federal tuition tax credit legislation would not create such a degree of political-religious fragmentation as to give rise to unconstitutionality.

In his separate opinion in *Walz*, Justice Harlan elaborated upon why the interface between political activity and religion is a subject of Establishment Clause concern:

> What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.
>
> [397 U.S. at 694 (Harlan, J., concurring).]

Few would disagree with Justice Harlan's observation. Legislation should be found invalid if it carries with it the potential for straining the "political system to the breaking point." That, of course, is an extreme situation, and one which is not present in the case of tuition tax benefit legislation. Particularly appropriate in this regard are Justice Powell's comments in *Wolman v. Walter*:

> At this point in the 20th century we are quite far removed from the dangers that prompted . . . the Establishment Clause. . . . *The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable* in light of the continuing oversight of this Court.
>
> [433 U.S. at 263 (Powell, J., separate opinion) (emphasis added).]

Indeed, in both *Nyquist* (413 U.S. at 796-97), and *Walz* (397 U.S. at 675), the Court pointed out that *tax* legislation is even less likely to lead to political disruption because it does not involve the necessity for annual budget appropriations that accompany government *grant* programs. *Cf. Meek v. Pittenger*, 421 U.S. at 372; *Lemon v. Kurtzman*, 403 U.S. at 623. In other words, one of the fundamental ingredients of political divisiveness—namely, annual legislative appropriations in order to continue the operation of a government aid program—is notably absent in the case of tax legislation such as the Packwood-Moynihan proposal. Senate Bill 550 thus appears to be less susceptible of attack because of political entanglements than legislation involving actual outlays of government funds.

Additionally, at its essence the political entanglements issue is concerned with "special benefits" for religious groups. *Kosydar v. Wolman*, 353 F. Supp. at 767. Such a "special benefit" rationale derives, of course, from the prohibition of religious preferences discussed earlier. As noted there, national legislation such as Senate Bill 550 is unlikely to involve such preferences, particularly when such legislation confers benefits upon a broad class of persons in a facially neutral fashion. Similar reasoning was expressed by the court in *National Coalition for Public Education v. Harris*, which upheld provisions of Title I of the Elementary and Secondary Education Act of 1965. In concluding that the Act does not present the potential for serious political divisiveness, the *Harris* court stressed the fact that it was national legislation, that it had a broad base of beneficiaries, and that it was only a part of a much larger social welfare program. 489 F. Supp. at 1269-70. Each of these factors can also be seen in Senate Bill 550. If enacted it would be only a small part of the much larger Internal Revenue Code.

Harris also emphasized that there was no evidence that enactment and implementation of Title I had given rise to divisive religious fragmentation in Congress. A similar consideration is applicable here. Although tuition tax credits have been a subject of congressional debate and careful scrutiny for a number of years, there is nothing to indicate that this debate has risen to the level of religious dispute or in-fighting. Indeed, the Court recently noted that careful consideration by Congress of the constitutionality of its enactments should have just the opposite effect. In *Rostker v. Goldberg*, 69 L. Ed. 2d 478 (1981), the Court pointed out that an enactment is entitled to heightened judicial deference when it previously has been carefully scrutinized by Congress for constitutional deficiencies.

Finally, political divisiveness along religious lines is *not*, standing alone, an independent basis for striking down legislation. *Tribe, supra*, at 866. On more than one occasion the Court has characterized it as merely a "warning signal" that can lead to more careful scrutiny of legislation under the other elements of the Establishment Clause test, but which does not "alone warrant the invalidation of . . . laws that otherwise survive" those other elements. *Committee for Public Education v. Nyquist*, 413 U.S. at 798. *See Lemon v. Kurtzman*, 403 U.S. at 625. Hence, even if the Packwood-Moynihan proposal raises political entanglement problems, such problems alone would not justify holding the legislation unconstitutional. Only if the proposal also runs afoul of the other elements of the three-part standard would such a result be warranted, and as detailed throughout this memorandum there is good reason to believe that Senate Bill 550 satisfies these

other elements. This, coupled with the reasons given above, leads to the conclusion that Senate Bill 550 would not be held deficient on entanglement grounds.

VIII. CONCLUSION

The validity of government assistance to nonpublic education is perhaps the most confused issue in the entire realm of constitutional law. As Judge Weis has noted, the Supreme Court's cases on this subject exhibit a marked "lack of a principled and logical thread." *Public Funds for Public Schools v. Byrne*, 590 F. 2d at 521 (Weis, J., concurring). Consequently, predictions concerning how the courts will react to any given piece of legislation are exceedingly difficult to make with precision.

These comments hold equally true for federal tuition tax benefit legislation. In a nutshell, the case law offers little reassuring guidance. Nevertheless, careful reading of the cases and analysis of the underlying policy considerations indicate that the Packwood-Moynihan proposal would be found constitutional. At the least, compelling arguments can be made to support such a proposition.

Senate Bill 550 is *national* legislation. This factor alone distinguishes it from prior cases and strongly militates in its favor. It is, additionally, a genuine tax measure, part of the much broader Internal Revenue Code. There is abundant legislative precedent for the proposal.

In closing, perhaps the more general observations of the Court in *Zorach v. Clauson*, 343 U.S. 306 (1951), and of Justice Powell in *Wolman v. Walter*, will serve to place the foregoing detailed analysis into perspective:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.
>
> [343 U.S. at 314.]

> Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.
>
> [433 U.S. at 262 (Powell, J., separate opinion).]

SENATE BILL 550:
THE PACKWOOD-MOYNIHAN PROPOSAL

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; DECLARATION OF POLICY.

(a) SHORT TITLE.—This Act may be cited as the "Tuition Tax Relief Act of 1981."

(b) DECLARATION OF POLICY.—The Congress hereby declares it to be the policy of the United States to foster educational opportunity, diversity, and choice for all Americans. Federal legislation—

(1) should recognize—

(A) the right of parents to direct the education and upbringing of their children, and

(B) the heavy financial burden now borne by individuals and families who must pay tuition to obtain the education that best serves their needs and aspirations—whether at the primary, secondary, or post-secondary level, and

(2) should provide some relief (as set forth in the amendments made by this Act).

The Congress finds that without such relief the personal liberty, diversity, and pluralism that constitute important strengths of education in America will be diminished. The Congress finds that this assistance can appropriately be provided through the income tax structure with a minimum of complexity and governmental interference in the lives of individuals and families. While the Congress recognizes that the Supreme Court is ultimately responsible for determining the constitutionality of provisions of law, the Congress finds that the provision of such relief to individuals or families in this manner is in accord with all provisions of the Constitution. The primary purpose of this Act is to enhance equality of educational opportunity for all Americans at the schools and colleges of their choice.

SECTION 2. CREDIT FOR EDUCATIONAL EXPENSES.

(a) IN GENERAL.—Subpart A of part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1954 (relating to credits allowable) is amended by inserting before section 45 the following new section:

SEC. 44F. EDUCATIONAL EXPENSES.

(a) GENERAL RULE.—In the case of an individual, there shall be allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to 50 percent of the educational expenses paid by him during the taxable year to one or more educational institutions for himself, his spouse, or any of his dependents (as defined in section 152).

(b) LIMITATIONS.—

(1) MAXIMUM DOLLAR AMOUNT.—The amount of educational expenses taken into account under subsection (a) for any taxable year with respect to any individual may not exceed—

(A) $500, in the case of educational expenses allocable to education furnished after July 31, 1982, and before August 1, 1983, and

(B) $1,000, in the case of educational expenses allocable to education furnished after July 31, 1983.

The $1,000 limitation contained in subparagraph (B) for any taxable year shall be reduced by the amount of educational expenses described in subparagraph (A) which are taken into account for that taxable year.

(2) CERTAIN PAYMENTS EXCLUDED.—

(A) SECONDARY AND ELEMENTARY SCHOOL EXPENSES.—Educational expenses attributable to education at a secondary school (including a vocational secondary school) or elementary school shall not be taken into account under subsection (a) to the extent that they are attributable to education at an elementary or secondary school (as defined in section 198 (a) (7) of the Elementary and Secondary Education Act of 1965, as in effect on January 1, 1981) of a State educational agency (as defined in section 1001 (k) of such Act as so in effect) that is privately operated except for expenses attributable to education at a school or institution described in subparagraph (C) of subsection (c) (5).

(B) PART-TIME AND GRADUATE STUDENTS.—

(i) IN GENERAL.—Educational expenses allocable to education furnished before August 1, 1984, with respect to any individual who is not a full-time student or who is a graduate student shall not be taken into account under subsection (a).

(ii) LESS THAN HALF-TIME STUDENTS.— Educational expenses allocable to education furnished after July 31, 1984, with respect to any individual who is not at least a half-time student shall not be taken into account under subsection (a).

(C) CERTAIN PAYMENTS INCLUDED.—For purposes of subparagraph (B) (i), amounts paid before August 1, 1984, for educational expenses allocable to education which is furnished on or after such date shall be treated as having been paid on such date.

(D) FULL-TIME STUDENT.—For purposes of this paragraph, the term 'full-time student' means any individual who, during any 4 calendar months during the calendar year in which the taxable year of the taxpayer begins, is a full-time student at an educational institution.

(E) HALF-TIME STUDENT.—For purposes of this paragraph, the term 'half-time student' means any individual who, during any 4 calendar months during the calendar year in which the taxable year of the taxpayer begins, is a half-time student (determined in accordance with regulations prescribed by the Secretary which are not inconsistent with regulations prescribed by the Secretary of Education under section 411 (a)(2) (A) (ii) of the Higher Education Act of 1965 for purposes of part A of title IV of that Act as such Act was in effect on January 1, 1981) at an educational institution.

(F) GRADUATE STUDENT DEFINED.—A graduate student is a student with a baccalaureate degree awarded by an institution of higher education.

(c) DEFINITIONS.—For purposes of this section—

(1) EDUCATIONAL EXPENSES.—The term 'educational expenses' means tuition and fees required for the enrollment or attendance of a student at an educational institution, including required fees for courses. Such term does not include any amount paid, directly or indirectly for—

(A) books, supplies, and equipment for courses of instruction at an educational institution,

(B) meals, lodging, transportation, or similar personal, living, or family expenses, or

(C) education below the first-grade level, or attendance at a kindergarten or nursery.

In the event an amount paid for tuition and fees includes an amount for any item described in subparagraph (A), (B), or (C) which is not separately stated, the taxpayer shall document the portion of such amount which is attributable to educational expenses.

(2) EDUCATIONAL INSTITUTION.—The term 'educational institution' means—

(A) an institution of higher education;

(B) a vocational school;

(C) a secondary school; or

(D) an elementary school.

(3) INSTITUTION OF HIGHER EDUCATION.—The term 'institution of higher education' means an institution described in section 1201(a) or 481(a) of the Higher Education Act of 1965 (as in effect on January 1, 1981).

(4) VOCATIONAL SCHOOL.—The term 'vocational school' means an area vocational education school (as defined in section 195(2) of the Vocational Education Act of 1963, as in effect on January 1, 1981) which is located in any State.

(5) ELEMENTARY AND SECONDARY SCHOOLS.—

(A) ELEMENTARY SCHOOL.—The term 'elementary school' means a privately operated, not-for-profit, day or residential school which provides elementary education and which meets the requirements of subparagraph (D).

(B) SECONDARY SCHOOL.—The term 'secondary school' means a privately operated, not-for-profit, day or residential school which provides secondary education that does not exceed grade 12, and which meets the requirements of subparagraph (D).

(C) HANDICAPPED FACILITIES INCLUDED.—The terms 'elementary school' and 'secondary school' include facilities (whether or not privately operated) which offer education for individuals who are physically or mentally handicapped as a substitute for regular public elementary or secondary education.

(D) REQUIREMENTS.—An elementary school or secondary school meets the requirements of this subparagraph if such school—

(i) is exempt from taxation under section 501(a) as an organization described in section 501(c) (3), and

(ii) does not exclude persons from admission to such school, or participation in such school, on account of race, color, or national or ethnic origin.

(6) MARITAL STATUS.—The determination of marital status shall be made under section 143.

(d) SPECIAL RULES.—

(1) ADJUSTMENT FOR CERTAIN SCHOLARSHIPS AND VETERANS BENEFITS.—

(A) REDUCTION OF EXPENSES.—The amounts otherwise taken into account under subsection (a) as educational expenses of any individual for any taxable year shall be reduced (before the application of subsection (b)) by any amounts attributable to the payment of educational expenses which were received with respect to such individual for the taxable year as—

(i) a scholarship or fellowship grant (within the meaning of section 117(a) (1)) which under section 117 is not includible in gross income,

(ii) an educational assistance allowance under chapter 32, 34, or 35 of title 38, United States Code, or

(iii) a payment (other than a gift, bequest, devise, or inheritance within the meaning of section 102(a)) which is for educational expenses, or attributable to attendance at an educational institution, and which is exempt from income taxation by any law of the United States.

(B) REDUCTION FOR OTHER AMOUNTS.—Under regulations prescribed by the Secretary, the amounts otherwise taken into account under subsection (a) as educational expenses of an individual for any taxable year

shall be reduced by any amount attributable to the payment of educational expenses which is received with respect to any individual for the taxable year and is not described in subparagraph (A), and which—

(i) is equal to the amount of the interest subsidy of any loan proceeds received by such individual during such taxable year, or

(ii) constitutes any other form of financial assistance to such individual.

The provisions of this subparagraph shall apply with respect to amounts received after the date on which the final regulations are issued.

(C) AMOUNTS NOT SEPARATELY STATED.—If an amount received by an individual which is described in subparagraph (A) or (B) is not specifically limited to the payment of educational expenses, the portion of such amount which is attributable to payment of educational expenses shall be determined under regulations prescribed by the Secretary.

(2) TAXPAYER WHO IS A DEPENDENT OF ANOTHER TAXPAYER.—No credit shall be allowed to a taxpayer under subsection (a) for amounts paid during the taxable year for educational expenses of the taxpayer if such taxpayer is a dependent of any other person for a taxable year beginning with or within the taxable year of the taxpayer.

(3) SPOUSE.—No credit shall be allowed under subsection (a) for amounts paid during the taxable year for educational expenses for the spouse of the taxpayer unless—

(A) the taxpayer is entitled to an exemption for his spouse under section 151(b) for the taxable year, or

(B) the taxpayer files a joint return with his spouse under section 6013 for the taxable year.

(e) DISALLOWANCE OF CREDITED EXPENSES AS CREDIT OR DEDUCTION.—No deduction or credit shall be allowed under any section of this chapter for any educational expense to the extent that such expense is taken into account (after the application of subsection (b)) in determining the amount of the credit allowed under subsection (a). The preceding sentence shall not apply to the educational expenses of any taxpayer who, under regulations prescribed by the Secretary, elects not to apply the provisions of this section with respect to such expenses for the taxable year.

(b) (1) CREDIT TO BE REFUNDABLE.—Subsection (b) of section 6401 of such Code (relating to amounts treated as overpayments) is amended—

(A) by striking out "and 43 (relating to earned income credit)" and inserting in lieu thereof "43 (relating to earned income credit), and 44F (relating to tuition tax credit)," and

(B) by striking out "39, and 43" and inserting in lieu thereof "39, 43, and 44F."

(2) paragraph (2) of section 55(b) of such Code (defining regular tax) is amended by striking out "and 43" and inserting in lieu thereof ", 43, and 44F."

(3) Subsection (c) of section 56 of such Code (defining regular tax deduction) is amended by striking out "and 43" and inserting in lieu thereof "43, and 44F."

(c) LIMITATION ON EXAMINATION OF BOOKS AND RECORDS.—Section 7605 of such Code (relating to time and place of examination) is amended by adding at the end thereof the following new subsection:

(d) EXAMINATION OF BOOKS AND RECORDS OF CHURCH-CONTROLLED SCHOOLS.—Nothing in section 44F (relating to credit for educational expenses) shall be construed to grant additional authority to examine the books of account, or the activities, or any school which is operated, supervised, or controlled by or in connection with a church or convention or association of churches (or the examination of the books of account or religious activities of such church or convention or association of churches).

(d) SEPARABILITY.—If any provision of section 44F of the Internal Revenue Code of 1954 (or any other provision of such Code relating to such section), or the application thereof to any person or circumstances, is held invalid, the remainder of the provisions of such section and the application of such provisions to other persons or circumstances, shall not be affected.

(e) DISREGARD OF REFUND.—Any refund of Federal income taxes made to any individual, and any reduction in the income tax liability of any individual, by reason of section 44F of the Internal Revenue Code of 1954 (relating to credit for educational expenses) shall not be taken into account as income or receipts for purposes of determining the eligibility of such individual or any other individual for benefits or assistance, or the amount or extent of benefits or assistance, under any Federal program of educational assistance or under any State or local program of educational assistance financed in whole or in part with Federal funds.

(f) TAX CREDIT NOT TO BE CONSIDERED AS FEDERAL ASSISTANCE TO INSTITUTION.—Any educational institution which enrolls a student for whom a tax credit is claimed under the amendments made by this Act shall not be considered to be a recipient of Federal assistance under this Act.

(g) CONFORMING AMENDMENT.—The table of sections for subpart A of part IV of subchapter A of chapter 1 of such Code is amended by inserting immediately before the item relating to section 45 the following:

"Sec. 44F Educational expenses.".

SEC. 3 EFFECTIVE DATE.

The amendments made by section 2 of this Act shall apply to taxable years ending after July 31, 1982, for amounts paid after such date for educational expenses incurred after such date.